81-5321

IN THE

SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.

Case No.

EARL ENMUND,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

I.

Whether a death sentence imposed upon a defendant convicted of felony murder is disproportional to the crime in violation of the Eighth and Fourteenth Amendments to the United States Constitution, where the death sentenced defendant did not actually kill the murder victim; was not actually present at the scene of the killing; did not intend the death of the victim; and was convicted solely as an aider and abettor to the robbery which provided the underlying felony for the felony murder conviction?

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OPINIONS BELOW

The opinion and judgment of the Supreme Court of Florida sought to be reviewed via this petition is not yet officially reported, but it is reproduced in the appendix as item 1. (A1-21)

JURISDICTION OF THE SUPREME COURT

The Supreme Court of Florida issued the opinion and judgment in this case on April 16, 1981. (A1-21) Petitioner filed a motion for rehearing which was denied on July 20, 1981. (A22) Petitioner asserted below and asserts here a deprivation of his rights as guaranteed under the United States Constitution. Title 28 United States Code, Section 1257(3) and Rule 17 of the United States Supreme Court Rules confers certiorari jurisdiction in this Court to review the judgment in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment VIII to the Constitution of the United States:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. Amendment XIV, Section 1 to the Constitution of the United States, in part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Section 921.141, Florida Statutes (1975) which is set forth in the Appendix as item 3. (A23-25)

4. Section 777.011, Florida Statutes (1975)

> Principal In First Degree. Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he is or is not actually or constructively present at the commission of such offense.

STATEMENT OF THE CASE

On May 22, 1975, a Hardee County, Florida grand jury indicted Petitioner for the first degree murder of Thomas Kersey, the first degree murder of Eunice Kersey and robbery of Thomas Kersey. (R8-10)(A26-28) Petitioner proceeded to a joint trial with his co-defendant Sampson Armstrong. (R959-1702)(A1) On September 30, 1975, both men were convicted as charged and both were sentenced to death for the murders. (R110-111,1697,1698,1701)(A29-30) Petitioner also received a life sentence for the robbery conviction. (R110-111,1697, 1698,1701)(A29-30) Another co-defendant, Jeanette Armstrong, was tried separately and was convicted of two counts of second degree murder and one count of robbery. (R16) She received three consecutive life sentences. (A16)

The Supreme Court of Florida affirmed Petitioner's convictions and sentences in the judgment now before this Court.

Around 8:00 a.m. on April 1, 1975, Thomas Kersey and his wife, Eunice, were found shot to death in their rural home in Hardee County, Florida. (R1020-1024,1102-1104)(A1-2) Thomas Kersey was shot twice and his wife was shot six times. (A2) Both .38 caliber and .22 caliber bullets were recovered from each body. (R1134-1144)(A2-3) A quantity of blood was located about five feet away from the bodies, leading investigators to think that one of the perpetrators might have

been wounded. (R1157)(A2) Additionally, Thomas Kersey's wallet was missing. (R1010,1014)(A5) He usually carried a substantial amount of cash and frequently flashed his money indiscriminately. (R1010,1014)(A4-5) A few weeks before the homicides, Petitioner and a friend jointly purchased a calf from Kersey, and at that time, Kersey had opened his wallet and bragged about his money. (R983-989,996-999,1507-1509)(A5)

Later on July 1st, Jeanette Armstrong was located in a nearby hospital under treatment for a gunshot wound. (R1131)(A2) She was married to Petitioner's co-defendant, Sampson Armstrong, and the daughter of Petitioner's common-law wife, Ida Jean Shaw. (R1132,1185)(A2,5)

Neighbors of the Kersey's testified that they heard six to fifteen gunshots the morning of April 1, 1975, between 7:30 a.m. and 8:00 a.m. They were two to three hundred yards from the Kersey residence at the time. (R1043-1045,1049-1050)(A3) Two other witnesses testified to driving by the Kersey residence around 7:35 a.m. on April 1, 1975. (R1025-1026, 1036-1041)(A3) One reported seeing a large cream-colored car on the side of the road occupied by a black male. (R1027)(A3) The car had a license tag with a prefix number of 18. (R1026)(A3) The other witness reported seeing a large, yellow car with a dark top occupied by one person with long hair. (R1041) He did not determine if the person was male or female. (R1041) Two days after the homicides, a yellow and brown Buick with a license tag prefix of 18 was located. (R1095) The car belonged to Ida Jean Shaw. (R1095)

One of Petitioner's neighbors testified that he saw Petitioner and Ida Jean Shaw in their yellow Buick about 6:30 or 6:45 a.m. on April 1, 1975. (R1298-1302)(A4) Two others, a male and a female, were in the back seat. (R1298-1302)(A4) Ida Jean was driving. (R1298-1302)(A4) The car was traveling

north toward the town of Wauchula. (R1298-1302)(A4) At 8:00 a.m., the neighbor saw the car traveling south with Petitioner driving, Ida Jean in the front seat and one of the two others in the back seat was lying down. (R1298-1302)(A4)

J.B. Neal, an acquaintance of Sampson Armstrong, testified that about 11:30 a.m. on the day of the homicides Armstrong told him about the murders. (R1348-1354)(A5) Armstrong said that he and his wife, Jeanette, went to the door of a house outside of Wauchula and asked the elderly man who answered the door for some water for an overheated car. The man went after a jug and Armstrong pulled a gun on the man at the back door. Armstrong told Jeanette to get the man's money. However, the man yelled for his wife who appeared with a gun and shot Jeanette. Armstrong then shot the woman and the old man. Armstrong said that he and Jeanette were both armed and had gone to house to commit a robbery. According to Neal's testimony, Armstrong never implicated Petitioner in the crime. (R1348-1354)(A5)

Ida Jean Shaw, Petitioner's common-law wife of twelve years (R1172,1182)(A5) testified at trial as a Court's witness over defense objections. (R1179-1269)(A6-9) The prosecutor granted her transactional immunity and agreed to dismiss pending perjury charges against her. Her previous inconsistent statements under oath regarding this case was the basis of the perjury charges. (R1178-1179)(A8-9) Shaw told four different stories. First, on the day of the homicide, she said that Jeanette received her gunshot wound when she entered an orange grove to urinate. (R1191-1192)(A6) Later, Shaw told the State Attorney a story implicating Petitioner and Sampson Armstrong in the crime. (R1179-1269)(A6) In two more statements, one a formal deposition, Shaw repudiated the original statement and gave another version implicating two men known as Luke and Willie. (R1179-1269)(A6) She said that Jeanette left with those two

men the night before the homicides and returned the next morning with the gunshot wound. (R1179-1269)(A6) Shaw said that the statement implicating Petitioner and Sampson Armstrong was a fabrication, contrived by agreement with Jeanette with the goal of putting Petitioner and Sampson in jail, thereby freeing the two women of their husbands. (R1179-1269)(A6)

At trial, Ida Jean Shaw testified that Jeanette and Sampson who lived in Lake Placid were visiting her and Petitioner. (R1179-1269)(A7) On Tuesday, April 1, 1975, Ida Jean awoke around 7:45 a.m. (R1186)(A7) Petitioner, Sampson, Jeanette and Ida Jean's yellow and brown Buick were gone. (R1186)(A7) About ten minutes later, either Petitioner or Sampson approached Ida Jean and said that Jeanette had been shot. (R1188,1223)(A7) The four of them went to the hospital. (R1190-1192)(A7) On the return trip to Wauchula, Ida Jean said she asked Petitioner, "Why he did it." Petitioner allegedly responded that he had seen Mr. Kersey's money when he purchased a cow. (R1205-1206)(A7) Ida Jean further testified that on the following day, while she, Sampson, Petitioner and some of Ida Jean's children drove back from the hospital, Sampson gave her $200. (R1195)(A7-8) Via a written note, Sampson indicated the money came from the robbery and that he had $600 left. (R1196-1197,1245-1248)(A7-8) Petitioner said nothing about a robbery. (R1196) Shaw used the $200 to make a payment on Petitioner's truck, but she did not tell Petitioner the money was from a robbery. (R1198-1198) Later, at the direction of Sampson and Petitioner, Ida Jean disposed of her .22 caliber pistol and a .38 caliber pistol belonging to Sampson or Jeanette. (R1198-1201,1231)(A8) Sampson said the guns had been used to kill some people. (R1202)(A8)

Sampson Armstrong testified in his own behalf. (R1413-1417) He denied murdering and robbing the Kersey's and said Ida Jean Shaw lied about his giving her $200. (R1428) Sampson

said he was at his home in Lake Placid from March 30 until Tuesday, April 1, when he heard his wife, Jeanette, had been shot. (R1413-1417)

Petitioner also testified at trial. He said that he awoke at 5:30 a.m. on April 1, ate breakfast, watched news on television and began some errands around town. (R1474-1476) He left Wauchula for his house about 7:45 a.m. (R1477-1478) When he returned home, Ida Jean and Jeanette left in Petitioner's red Plymouth to pay some bills in Avon Park. (R1479-1480) He noticed that Ida Jean had forgotten a check, and he followed them to give it to her. (R1480-1482) In Avon Park, Petitioner saw his Plymouth parked at a store. He stopped, and Ida Jean told him that Jeanette had been shot when she went into an orange grove to urinate. (R1482) Petitioner called Lake Placid to leave a message for Sampson Armstrong and followed the ambulance to the hospital. (R1483-1484)

The Supreme Court of Florida affirmed the sufficiency of the evidence to support Petitioner's convictions. (A1-21) The opinion noted the following conclusions:

> There was no direct evidence at trial that Earl Enmund was present at the back door of the Kersey home when the plan to rob the elderly couple led to their being murdered. J.B. Neal's account of what Sampson Armstrong told him did not include any reference to Enmund. Ida Jean Shaw testified to Enmund's absence that morning and his statements of his complicity. But the only evidence of the degree of his participation is the jury's likely inference that he was the person in the car by the side of the road near the scene of the crimes. The jury could have concluded that he was there, a few hundred feet away, waiting to help the robbers escape with the Kersey's money. The evidence, therefore, was sufficient to find that the appellant was a principal of the second degree, constructively present aiding and abetting the commission of the crime of robbery. This conclusion supports the verdicts of murder in the first degree on the basis of the felony murder portion of section 782.04(1)(a).

(A15)

On his appeal to the Supreme Court of Florida, Petitioner raised the issue of the constitutionality of his death

sentence under the Eighth and Fourteenth Amendments, since he was convicted on a felony murder theory, he did not intend the death of the victims, did not actually kill the victims and was not actually present at the scene of the robbery at the time the killings occurred. The Supreme Court of Florida held:

> Appellant contends that since the evidence does not establish that he intended to take life, the death penalty is impermissible under the eighth amendment ban on cruel and unusual punishment. Appellant offers us no binding legal authority that directly supports this proposition, and we therefore reject it.

(A16)

REASONS FOR GRANTING THE WRIT

I.

A DEATH SENTENCE IMPOSED UPON A DEFENDANT CONVICTED OF FELONY MURDER IS DISPROPORTIONAL TO THE CRIME IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHERE THE DEATH SENTENCED DEFENDANT DID NOT ACTUALLY KILL THE MURDER VICTIM; WAS NOT ACTUALLY PRESENT AT THE SCENE OF THE KILLING; DID NOT INTEND THE DEATH OF THE VICTIM; AND WAS CONVICTED SOLELY AS AN AIDER AND ABETTOR TO THE ROBBERY WHICH PROVIDED THE UNDERLYING FELONY FOR THE FELONY MURDER CONVICTION.

The issue of whether a death sentence is a proportionate penalty where the killing for which the defendant stands convicted was unintentional or committed by a co-perpetrator in the course of a felony murder is not new to this Court. However, this Court has never decided this question. In Gregg v. Georgia, 428 U.S. 153 (1976), this Court held:

> ...when a life has been taken deliberately by the offender, we cannot say that the punishment is unvariably disproportionate to the crime. (Emphasis added)

Id., at 187. That holding left open the issue of whether an unintentional killing violates the mandates of the Eighth and Fourteenth Amendments.

During the same year as the Gregg decision, this court specifically reserved ruling on the above issue in Woodson v. North Carolina, 428 U.S. 280, 305 n. 40 (1976). In 1978, the issue arose again in Lockett v. Ohio, 438 U.S. 586 (1978), but the plurality opinion in that case did not reach or address the question. Chief Justice Burger, writing for the Court, did criticize Ohio's death penalty statute for not taking into account as a mitigating factor the lack of a specific intent to cause the death of the victim and the defendant's role in a felony-murder situation. Id.

Three of the concurring Justices in Lockett, although not able to agree on a single opinion, would have gone further than the Court's opinion to hold that the death penalty cannot be constitutionally imposed in a case where a defendant did not possess the intent to kill and/or was only vicariously involved in a felony-murder. Justice Blackmun concluded that, although it was impossible to define "a convincing bright line rule such as was used in regard to rape, Coker v. Georgia, 433 U.S. 584 (1977), to make workable a disproportionality approach" in a case such as Lockett, the sentencing authority should seriously consider a defendant's participation and the character of his mens rea. Lockett v. Ohio, 438 U.S. 586,613 (1978) (Justice Blackmun concurring) Justices Marshall and White, on the other hand, would develop a per se unconstitutional rule where there was no intent to cause death and/or there existed only proof of a felony murder. Justice Marshall noted:

> When a death sentence is imposed under the circumstances presented here, I fail to understand how any of my Brethren--even those who believe that the death penalty is not wholly inconsistent with the Constitution--can disagree that it must be vacated.... The imposition of the death penalty for this crime totally violates the principle of proportionality embodied in the Eighth Amendment's prohibition, Weems v. United States, 217 U.S. 349 (1910); it makes no distinction between a wilful and malicious murderer and an accomplice to an armed robbery in

> which a killing unintentionally occurs. See State v. Lockett, 49 Ohio St.2d 48, 67 (1976)(dissenting opinion).
>
> Permitting imposition of the death penalty solely on proof of felony-murder, moreover, necessarily leads to the kind of "lightning bolt," "freakish," and "wanton" executions that persuaded other members of the Court to join MR. JUSTICE BRENNAN and myself in Furman v. Georgia, 408 U.S. 238 (1972), in holding Georgia's death penalty statute unconstitutional. Whether a death results in the course of a felony (thus giving rise to felony-murder liability) turns on fortuitous events that do not distinguish the intention or moral culpability of the defendants. That the State of Ohio chose to permit imposition of the death penalty under a purely vicarious theory of liability seems to belie the notion that the Court can discern the "evolving standards of decency," Trop v. Dulles, 356 U.S. 86,101 (1959), embodied in the Eighth Amendment, by reference to state "legislative judgments," see Gregg v. Georgia, 428 U.S. 153,175 (opinion of STEWART, POWELL, STEVENS, JJ.).

Lockett v. Ohio, 438 U.S. 586,619,620 (1978)(Justice Marshall, concurring). Justice White relied upon the proportionality rule of Furman v. Georgia, 408 U.S. 238 (1972) and Coker v. Georgia, 433 U.S. 584 (1977) in concluding that a death sentence is disproportionate to the severity of the crime where a defendant did not intend to cause the death of the victim:

> I nevertheless concur in the judgment of the Court reversing the imposition of the death sentences because I agree with the contention of the petitioner...that it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim.
>
> It is now established that a penalty constitutes cruel and unusual punishment if it is excessive in relation to the crime for which it is imposed. A punishment is disproportionate "if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground." Coker v. Georgia, 433 U.S. 584,592 (1977) (Opinion of WHITE,J.). Because it has been extremely rare that the death penalty has been imposed upon those who were not found to have intended the death of the

> victim, the punishment of death violates both tests under the circumstances present here.
>
> * * *
>
> I recognize that approximately half of the States have not legislatively foreclosed the possibility of imposing the death penalty upon those who do not intend to cause death. The ultimate judgment of the American people concerning the imposition of the death penalty upon such defendants, however, is revealed not only by the content of statutes and by the imposition of capital sentences but also by the frequency with which society is prepared actually to inflict the punishment of death. See Furman v. Georgia, 408 U.S. 238 (1972). It is clear from recent history that the infliction of death under circumstances where there is no purpose to take life has been widely rejected as grossly out of proportion to the seriousness of the crime.
>
> * * *
>
> Under, those circumstances the conclusion is unavoidable that the infliction of death upon those who had no intent to bring about the death of the victim is not only grossly out of proportion to the severity of the crime but also fails to significantly contribute to acceptable or, indeed, any perceptible goals of punishment. (Emphasis added)

Lockett v. Ohio, 438 U.S. 586,624-625 (1978)(Justice White, concurring).

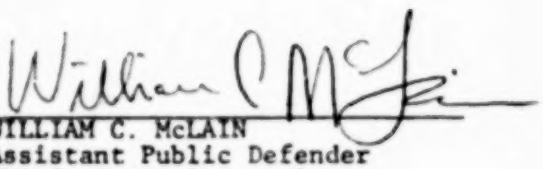
The time is ripe for this Court to squarly address the issue presented in this case. Petitioner's case is an excellent vehicle to decide the troublesome question of whether a defendant should die when convicted of felony murder where a co-defendant killed the victim, even though the defendant himself did not intend the death of the victim and was not present at the time of the killing. The Supreme Court of Florida has carefully sifted the facts and concluded that Petitioner's guilt rests on a felony murder theory. Additionally, that court clearly held that, at best, the facts demonstrated that Petitioner was not actually present at the scene of the murder. Enmund v. State, __So.2d__ (Fla.1981)(Case No. 48,525, opinion

filed April 16). (A15) Petitioner believes his death sentence is disproportional to his crime in violation of the Eighth and Fourteenth Amendments. He urges this Court to grant a writ of certiorari.

CONCLUSION

Upon the foregoing reasons, Petitioner asks this Court to grant a writ of certiorari.

Respectfully submitted,

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APPENDIX

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Supreme Court of Florida

No. 48,525

EARL ENMUND, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[April 16, 1981]

PER CURIAM.

This cause is before the Court on appeal from a judgment of conviction on two counts of murder in the first degree and one count of robbery. The Circuit Court of the Tenth Judicial Circuit, in and for Hardee County, sentenced appellant Earl Enmund to death, thus vesting in this Court jurisdiction of his appeal. Art. V, § 3(b)(1), Fla. Const.

The appellant and co-defendant Sampson Armstrong were tried together and convicted of the first-degree murders and robbery of Thomas and Eunice Kersey. After returning verdicts of guilt the trial jury heard evidence on the issue of sentence pursuant to section 921.141, Florida Statutes (1975), and recommended the death penalty for both defendants. The trial court imposed sentences of death on the appellant for the two counts of first-degree murder and a sentence of life imprisonment for the crime of robbery. We affirm the judgments of guilt of murder and robbery and the sentences of death.

I. Facts

On April 1, 1975, at about eight o'clock, a.m., the bodies of Thomas and Eunice Kersey were discovered by their daughter in their rural Hardee County home, located on state highway 62

between Fort Green to the west and Wauchula to the east. Mr. and Mrs. Kersey, aged eighty-six and seventy-four respectively, had been shot to death.

Some of the evidence constituting the state's case in the trial court consisted of physical items recovered at the scene and examined in the course of investigation. The bodies were found on the kitchen floor, near the back door of the home. There was a quantity of blood on the floor, some five feet away from where the bodies were lying, that prompted the authorities to investigate the possibility that one of the perpetrators was wounded during the attack. Later that morning, police found Jeanette Armstrong, the wife of co-defendant Sampson Armstrong, being treated for a gunshot wound in a hospital in nearby Avon Park, in Highlands County. The blood recovered at the scene proved to be of a different type from either of the Kerseys' blood, and to match the blood type of Jeanette Armstrong.

On the ground outside the house, investigators found a plastic jug filled with water.

There were four firearm projectiles found at the scene. One was on the ground outside the house, one in the door jamb of the back door, one in the water heater in the kitchen of the house, and one on the floor, under the body of Mrs. Kersey. Mrs. Kersey was shot six times in all, with three of the wounds being superficial so that three of the bullets exited the body. Three bullets remained in her body and were recovered. The three bullets found in the body all entered the body in the right side and passed downward.

Mr. Kersey was shot twice. One bullet entered his right arm and passed on through his heart to the left side of his body. The other entered his chest from directly in front. Both bullets were recovered. The bullet that entered from the right side had a slight downward angle. The one that entered the front of the chest was almost straight in its path from front to back. According to expert firearms identification testimony, one of the bullets recovered was a .38 caliber and the other was a .22 caliber. The .38 caliber bullet from the body of Mr. Kersey, a

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.38 caliber bullet from the body of Mrs. Kersey, and the .38 caliber bullet found in the kitchen door jamb, were all fired from the same weapon. The .22 caliber bullet found in the body of Mr. Kersey and a .22 caliber bullet from Mrs. Kersey were both fired from the same gun.

The pathologist who testified at trial told the court and the jury that when a bullet enters the body, it can be deflected in numerous ways, so that it is difficult to discern the angle of fire from the path of the bullet. With regard to the specific question of reconstructing the position of Mrs. Kersey when she was shot, based on the paths of the bullets, the pathologist testified, "Well, there are all sorts of possibilities. . . . There is really no way that I could determine what position her body was in when she was shot. . . . [S]he was shot from below, above, and behind." None of the entrance wounds on either of the bodies were inflicted from a range of closer than several feet away.

The state presented the testimony of a witness who drove by the Kersey home between 7:30 and 7:40 a.m. on the day the bodies were found. When she passed the Kersey home, she saw on the side of the road a large, cream-colored car with a license tag bearing the prefix number 18. There was a black man in the car. Another witness for the state drove by the house at 7:35 that morning and saw a car parked beside the road about two hundred yards west of the house. It was a large, yellow car with a dark colored top. There was one person in the car.

The state's evidence also included the testimony of two of the Kerseys' neighbors. One testified that on April 1st he was at work on his own land only two or three hundred yards from the Kerseys' house when, at about 7:45 a.m., he heard from six to fifteen shots of gun fire and some high-pitched screaming. The other neighbor said that he lives only two hundred yards west of the Kerseys, and that between 7:30 and 8:00 o'clock that morning he heard about seven loud sounds. He would have thought that they were caused by Mr. Kersey hammering to separate some scrap

metal, except for their irregular sequence. From the sounds he remembered, he concluded that they also could have been gunfire.

A neighbor of the appellant also testified for the state. He said he lived about three-fourths of a mile from Enmund's home, and that they both lived on a road that runs off of New York Avenue south of the town of Wauchula. This witness testified that on the morning of April 1st, at about 6:30 he was standing out beside the road, New York Avenue, that goes into Wauchula to the north. He was waiting for a ride that was to take him to another town on personal business. The person who was to meet him there did not come that morning, but he was still standing there waiting for him after 8:00 o'clock. The witness said that at approximately 6:30 or 6:45, he saw Earl Enmund and his former common-law wife Ida Jean Shaw in their yellow Buick with a vinyl top. Ida Jean Shaw was driving. There were two others in the back seat, one male and one female. The car traveled north toward town (the town of Wauchula). At about 8:00 o'clock, the car came back, travelling "pretty fast" in a southerly direction on New York Avenue, with the appellant driving, Ida Jean Shaw in the front seat, and one of the other two people in the car lying down across the back seat.

The husband of the Kerseys' granddaughter testified that Mr. Kersey usually kept large amounts of cash on his person. He generally kept the cash in the form of one-hundred-dollar bills. It was not unusual for him to have from ten to twenty of these on his person at any given time. He kept the money in his wallet, and the wallet was in his hip pocket at all times. He normally slept in his regular work clothing and kept the wallet in his pocket even as he slept.

Mr. Kersey, the witness testified, liked to show his cash to people he dealt with, and he did so frequently and indiscriminately. He tended to save his money rather than to spend it, and he was proudly vocal about having it. He was a large, strong man who felt that he could protect his wallet.

Another witness testified that two weeks prior to the murders, he saw that Mr. Kersey had from twelve to fifteen hundred dollars on his person.

A few weeks prior to the murders, the appellant and a friend jointly purchased a calf from Mr. Kersey. They paid him in cash and when Mr. Kersey took out his wallet to put away the money he showed them its contents. Appellant Enmund said, "Look at the money this man's got." Mr. Kersey responded, "That ain't no money. I can dig up $15,000, $16,000 any time I want to." Appellant's friend told Mr. Kersey that he shouldn't be showing his money around like that. Mr. Kersey said, "I know you, Jim." The other man responded, "Yeah, you know me but you don't know the rest of them." After the killings, Mr. Kersey's wallet was not found on his person or anywhere in the house.

J. B. Neal testified that at about noon on April 1, 1975, he saw co-defendant Sampson Armstrong in Lake Placid, in Highlands County. Armstrong told Neal that he and his wife Jeanette had done a robbery that morning at a ranch house outside of Wauchula and that Jeanette had been shot. Armstrong told the witness that they had gone to the back door of the house of an elderly man and woman, saying that they needed water for an overheated car. When Mr. Kersey came out of the house, Armstrong grabbed him, held his gun on him, and told Jeanette to get the money out of his pocket. Then, the old man cried out to his wife, and through a window Armstrong saw Mrs. Kersey coming out the front door and around the house with a gun. Mrs. Kersey shot Jeanette Armstrong. Then Armstrong knocked the old man down and shot Mrs. Kersey. Mr. Kersey got back up and Armstrong shot him in the chest. After the shooting, they put the old people in the house, took the money and left.

Jeanette Armstrong is the daughter of Ida Jean Shaw. In April of 1975, Ida Jean Shaw and Earl Enmund were living together as husband and wife, and had been doing so for about twelve years.

There was testimony that the investigating authorities, based on witnesses' descriptions of the car seen near the Kersey

home the morning of the murders, began to search for a large, yellow or cream-colored car with a dark top and having an "18" license tag prefix. They found a car meeting this general description in the possession of Ida Jean Shaw.

At Walker Memorial Hospital in Avon Park on the morning of the murders, police questioned Ida Jean Shaw concerning Jeanette Armstrong's gunshot wound. She told them that she and Jeanette had been travelling that morning from Wauchula to Avon Park when Jeanette entered an orange grove to urinate and was shot. In the subsequent course of the investigation of the Kersey murders, Ida Jean Shaw gave a statement to the state attorney implicating the appellant and Sampson Armstrong in the crimes. Subsequent to that initial statement, she gave two statements, one of them a formal deposition, in which she repudiated the original statement. In these statements she said that Jeanette Armstrong left her house on March 31, 1975 with two men referred to as Luke and Willie. According to this story, Jeanette said that they were going to Fort Myers to a nightclub. On the following morning, Luke and Willie brought Jeanette home wounded. Jeanette, Luke and Willie then told Ms. Shaw to tell anyone who asked that Jeanette had been shot while trespassing in a citrus grove. The import of the story told in the depositions was to implicate "Luke and Willie" in the Kersey murders and to exculpate the defendants. In one of her depositions, Ida Jean Shaw stated that her earlier statement implicating the defendants in the crimes was false and was fabricated by agreement with Jeanette Armstrong and calculated to put Earl and Sampson in jail and thus be free of the strictures of married life.

Ida Jean Shaw, over the objections of the defendants, was called to testify at trial as a court's witness. The court examined her and then the state and counsel for each of the defendants cross-examined her.

Ms. Shaw testified at trial as follows. At and around the time of the crimes, she and the appellant lived together in a house on Revell Road in Wauchula, and that they had held themselves out to friends and neighbors and in business

transactions as husband and wife for twelve years. Her daughter Jeanette was married to Sampson Armstrong and lived in Lake Placid. On the weekend preceding Tuesday, April 1st, Ms. Shaw celebrated a birthday. On Friday night, Jeanette came to her home. On Sunday, she and Jeanette went to Lake Placid and brought Sampson back. On Monday night, March 31, Jeanette, Sampson, and the appellant Enmund were all there at the house in Wauchula. On Tuesday, April 1st, when she awoke at about 7:45 a.m., none of the three was there. Neither was her brown and yellow 1969 Buick.

Ms. Shaw got up and went to the neighborhood wash house. About ten minutes later, either Enmund or Sampson Armstrong came into the wash house and told her that Jeanette had been shot. Ida Jean Shaw went back to the house. Jeanette was in the appellant's red Plymouth automobile. Sampson was with her and the appellant was in the house. Ms. Shaw then took Jeanette up to the local store corner and called an ambulance. Then appellant Enmund came to the corner where they were awaiting the ambulance and asked her what had happened to Jeanette. Ida Jean Shaw told Enmund that Jeanette had been shot in an orange grove. Then the ambulance came and Ida Jean accompanied Jeanette on the ride to the hospital. Ida Jean learned from Jeanette how she was shot. Earl followed in a separate car. Sampson Armstrong also went to the hospital that day.

After spending Tuesday morning at the hospital, Ms. Shaw left there with Earl and Sampson. They went to Wauchula to get the children and then went on to Lake Placid. On the way to Wauchula, Ida Jean Shaw asked the appellant "why he did it." He replied that he had seen Mr. Kersey's money and therefore decided to rob him. Sampson Armstrong said that he made sure the people were dead.

Ida Jean Shaw testified further that on Wednesday, April 2, 1975, she, Earl, Sampson, and some of her children were in a car on their way home from the hospital when Sampson gave her $200. By passing written notes in the car, she asked him how much money he got out of the robbery and he responded that he had

$600 left. She took the $200 and made a loan payment on an account of Earl Enmund's that was in arrears. There was corroborating testimony of this, and that the bill was paid with two one-hundred-dollar bills.

Ms. Shaw testified that prior to the events o. April 1st, she kept a .22 caliber pistol in the glove compartment of her car. On April 2, she removed the gun from the loft at her house on Earl Enmund's directions. He and Sampson told her to get rid of the gun and also a .38 caliber pistol that was at the house, because, Sampson said, they had been used to kill some people. She put the guns in the bottom of a bucket of greens and gave the bucket to a friend, Jeanette's paternal uncle. This person testified that the bucket was a large and heavy metal one and that the greens spoiled in the trunk of his car. He said he threw them away, bucket and all, and didn't know about the guns. The murder weapons were never recovered.

At trial Ms. Shaw testified that the story about Luke and Willie was a complete fabrication, and that she made up the story and related it at the request of the defendants. Earl Enmund, she said, instructed her on this matter in letters smuggled out of the jail.

The state's counsel moved that Ida Jean Shaw be called as a court's witness on the ground that due to the inconsistencies in her pretrial statements, the state was not certain how she would testify and would not vouch for her credibility. Through her examination by the court, cross-examination by the state, and cross-examination by counsel for each of the defendants, the following matters pertaining to her credibility were brought out for consideration by the jury. Ms. Shaw was granted immunity from prosecution for any role she might have played in the murders and robbery. As related above, she gave several inconsistent statements during the investigation and prosecution of the crimes. One of her statements was in a deposition under oath, and at trial she conceded that she had lied in that statement. Prior to the trial, she was charged with perjury. She was arrested and held in jail for thirteen days. The

prosecutors advised her of the maximum penalty for the crime of which she stood accused. Then they promised her that she would not be prosecuted for perjury if she would testify at the murder and robbery trial and tell the truth.

II. Issues on Appeal of the Judgment of Conviction

The appellant raises several points which he contends require the reversal of his convictions.

The appellant contends that the trial court erred in refusing to grant judgment of acquittal of the charge of robbery on the ground that there was insufficient evidence to support the verdict of guilt of that crime. We have carefully reviewed the record of the proceedings below and conclude that the judgment of conviction of the crime of robbery rests upon legally sufficient evidence.

The appellant argues that the trial court erred in denying his motion to exclude the testimony of Ida Jean Shaw. He asserts that her inconsistent pretrial statements, which resulted in a charge of perjury, rendered her so unreliable as to be an incompetent witness. He also contends that the pendency of her perjury prosecution, which she was promised would be discontinued if she would testify truthfully, created an unacceptably high risk that her testimony would be the product of coercion.

With regard to the unreliability argument, the trial court informed the jury that Ms. Shaw was being called as a court's witness because the state could not vouch for her credibility. The jury was instructed to consider her testimony and to accord it whatever credibility they thought it deserved. It is within the discretion of the trial judge to call an uncooperative witness as a court's witness to allow the state to ask leading questions. McCloud v. State, 335 So.2d 257 (Fla. 1976).

With regard to the issue of coercion, the appellant cites Davis v. State, 334 So.2d 823 (Fla. 1st DCA 1976), cert. denied, 345 So.2d 427 (Fla. 1977), and Lee v. State, 324 So.2d 694 (Fla.

1st DCA 1976). The Lee case quoted this Court's statement in Mathews v. State, 44 So.2d 664 (Fla. 1950), that

> In interviews with witnesses before trial, the examiner "must exercise the utmost care and caution to extract and not to inject information, and by all means to resist the temptation to influence or bias the testimony of the witnesses."

Lee v. State, 324 So.2d at 698.

In Davis, the prosecuting attorney asked the trial court to delay the swearing of the jury because one of the witnesses he intended to call had become uncooperative. The witness, a close friend of the defendant, had made a statement in a deposition which linked the defendant to the crime but immediately before trial gave a different account of what she knew. The prosecutor conferred with her and told her that she had three choices: refuse to testify and be held in contempt of court and jailed; give an account that differed from her deposition statement and be charged with perjury and possibly imprisoned for fifteen years; or testify to "the truth" in which event nothing would happen to her. The circumstances of the prosecutor's conference with the witness were revealed to the jury. On appeal, the district court reversed and remanded for a new trial, citing as authority Lee v. State. Applying the Lee principle to the facts before it, the court in Davis concluded:

> While it is true that the assistant state attorneys admonished the witness to tell the truth, it must have been obvious to the witness that the "truth" was that which she had testified to at an earlier deposition. Rules of evidence and procedure exist which are designed to assist prosecution and defense alike in eliciting the truth from balky witnesses. Coercion and threats are not among these rules.

Davis v. State, 334 So.2d at 826.

The appellant contends that when the prosecution told Ida Jean Shaw that she could be released from jail and have the perjury charges dropped if she would tell "the truth," there is an unacceptably high probability that she understood that the "truth" the prosecution wanted was testimony linking the appellant to the crimes. We disagree. In Lee v. State, the error was not in allowing the witness to testify but in keeping from the jury information regarding the arrangement by which the

state gained the cooperation of the witness. In Davis, the prosecutor indicated to the witness that she should testify consistently with what she said before. Thus he "injected" information. In the case sub judice, the prosecution did not suggest to Ms. Shaw what they wanted her to say, but simply advised her to tell the truth. We hold that the court did not abuse its discretion in allowing into evidence the testimony of Ida Jean Shaw.

The appellant contends that a new trial is required because the jury was not fully informed of the understanding between the state and Ida Jean Shaw. It is true, as appellant points out, that it is a denial of due process if the jury is misled as to facts bearing on the credibility of a witness. Napue v. Illinois, 360 U.S. 264 (1959). If a failure to fully inform the jury of the interest of a witness could in any reasonable likelihood have affected the decision of the jury, a new trial is required. Giglio v. United States, 405 U.S. 150 (1972); Wolfe v. State, 190 So.2d 394 (Fla. 1st DCA 1966). Our review of the record reveals that the jury in the present case was fully informed of Ms. Shaw's immunity transaction and her pending perjury prosecution.

The appellant contends that there is no evidence that he committed premeditated murder on either of the victims, or that he was present aiding and abetting the robbery when they were shot. He argues that the very most the jury could have concluded from the evidence is that he was in the car seen out by the highway when the robbery and murders were committed. Therefore, he contends, the most serious crime of which he could be convicted with regard to each of the homicides is murder in the second degree, based on the felony murder rule.

In support of this contention appellant cites the distinction drawn by this Court in State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), between first-degree felony murder and second-degree felony murder. At the time of the crimes, the degrees of homicide were defined by section 782.04, Florida Statutes (1973). The definitions of

murder given in that statute had been revised by chapter 72-724, Laws of Florida, and those revisions were construed in Dixon. The Court said that the new statute established "two separate and easily distinguishable degrees of crime, depending upon the presence of the defendant as a principal in the first or second degree." State v. Dixon, 283 So.2d at 11. Section 782.04 as amended by chapter 72-724 evinced a legislative intent "to resurrect the distinction between principals in the first or second degree on the one hand and accessories before the fact on the other, in determining whether a party to a violent felony resulting in murder is chargeable with murder in the first degree or murder in the second degree." Id. at 11. The distinction had previously been laid to rest for all purposes by chapter 57-310, Laws of Florida. See § 776.011, Fla. Stat. (1973).

In a later case, the Court explained that the Dixon construction had provided a limited scope to the second-degree felony murder provision, and held that under the murder statute as amended by chapter 72-724,

> an individual who personally kills another during the perpetration or attempt to perpetrate one of the enumerated felonies is guilty of first degree murder. In such circumstances, the statutory scheme does not allow for a conviction of second degree murder. Moreover, the felon's liability for first degree murder extends to all of his co-felons who are personally present. As perpetrators of the underlying felony, they are principals in the homicide. In Florida, as in the majority of jurisdictions, the felony murder rule and the law of principals combine to make a felon generally responsible for the lethal acts of his co-felon. Only if the felon is an accessory before the fact and not personally present does liability attach under the second degree murder provision of the applicable statute in the instant case.

Adams v. State, 341 So.2d 765, 768-69 (Fla. 1976), cert. denied, 434 U.S. 878 (1977)(footnote omitted). We conclude, therefore, that if the appellant's conduct that the jury could have found from the evidence made him an accessory before the fact to the underlying felony of robbery, then his contention that the highest offense for which he may be convicted is second-degree murder must be accepted. If, on the other hand, the jury could have concluded from the evidence that the appellant was a principal of the first or second degree in the crime of robbery,

then his contention is without merit and we must hold that the evidence was sufficient for a verdict of guilty of murder in the first degree. To determine the issue as thus framed, it is necessary, as Dixon suggested, to "refer to the rich heritage of case law on the distinctions between principals in the first or second degree and accessories before the fact." State v. Dixon, 283 So.2d at 11.

All persons participating in a crime are principals of the first or second degree. The actual perpetrator is a principal of the first degree. A person who does not commit the crime with his own hands but is present, aiding and abetting the actual perpetrator, is a principal of the second degree. They are both equally guilty of the crime being committed. Lake v. State, 100 Fla. 373, 129 So. 827 (1930). "An accessory before the fact is one who, though absent at the time of the commission of an offense, does nevertheless procure, counsel, command, or abet another to commit such offense." Kaur v. State, 98 Fla. 687, 124 So. 177, 178 (1929). See generally Henderson v. State, 70 So.2d 358 (Fla. 1954); Albritton v. State, 32 Fla. 358, 13 So. 955 (1893).

The legislature did away with these distinctions when it enacted section 776.011, Florida Statutes (1973). Ch. 57-310, § 1, Laws of Fla. Section 776.011 provided:

> 776.011 Principal in first degree.--Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, is a principal in the first degree and may be charged, convicted and punished as such, whether he is or is not actually or constructively present at the commission of such offense.

However, when the legislature amended the law of murder in 1972, ch. 72-724, Laws of Fla., it revived a distinction, according to this Court's construction in Dixon and Adams, between principals of the first and second degree on the one hand and accessories before the fact on the other, for purposes of distinguishing first and second degree felony murder. This is why the pre-existing case law on that distinction is still relevant. The law

of murder as amended by chapter 72-724 was in force at the time of the crimes at issue herein. It provided:

> 782.04 Murder.--
> (1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen years when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in §775.082.
>
> (b) In all cases under this section, the procedure set forth in §921.141 shall be followed in order to determine sentence of death or life imprisonment.
>
> (2) When perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, or when committed in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, except as provided in subsection (1), it shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment in the state prison for life or for such term of years as may be determined by the court.
>
> (3) When perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, it shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in §775.082, §775.083, or §775.084.

§ 782.04, Fla. Stat. (1973).

In a prosecution for murder in the first degree, if the accused was present aiding and abetting the commission or attempt of one of the violent felonies listed in the first-degree murder statute, he is equally guilty, with the actual perpetrator of the underlying felony, of first-degree murder. E.g. Pope v. State, 84 Fla. 428, 94 So. 865 (1922). Furthermore,

> the presence of the aider and abetter need not have been actual, but it is sufficient if he was constructively present, provided the aider, pursuant to a previous understanding, is sufficiently near and so situated as to abet or encourage, or to render assistance to, the actual perpetrator in committing

the felonious act or in escaping after its commission.

Id. at 446, 94 So. at 871.

There was no direct evidence at trial that Earl Enmund was present at the back door of the Kersey home when the plan to rob the elderly couple led to their being murdered. J. B. Neal's account of what Sampson Armstrong told him did not include any reference to Enmund. Ida Jean Shaw testified to Enmund's absence that morning and his statements of his complicity. But the only evidence of the degree of his participation is the jury's likely inference that he was the person in the car by the side of the road near the scene of the crimes. The jury could have concluded that he was there, a few hundred feet away, waiting to help the robbers escape with the Kerseys' money. The evidence, therefore, was sufficient to find that the appellant was a principal of the second degree, constructively present aiding and abetting the commission of the crime of robbery. This conclusion supports the verdicts of murder in the first degree on the basis of the felony murder portion of section 782.06(1)(a).

The judgment of conviction of two counts of first-degree murder and one count of robbery is therefore affirmed.

III. Sentence

We come now to the consideration of the sentences of death imposed on the appellant pursuant to section 921.141, Florida Statutes (Supp. 1974). The appellant has presented a number of arguments in his brief, only a few of which we find merit consideration.

Appellant contends that section 921.141 improperly restricts the jury and judge to the consideration of the mitigating circumstances enumerated in the statute. Thus, he argues, the statute violates the eighth and fourteenth amendments under Lockett v. Ohio, 438 U.S. 586 (1978). We have held that our statute, as it has been construed and applied, does not restrict the jury's consideration and differs from the statute considered in Lockett. Songer v. State, 365 So.2d 696, 700 (1978)(on rehearing), cert. denied, 441 U.S. 956 (1979). See

generally Proffitt v. Florida, 428 U.S. 242 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973).

Appellant contends that the trial judge's factual findings on which he based the decision to impose death were derived in part from information not disclosed to the appellant and which he therefore had no opportunity to rebut, explain, or deny. A death sentence based on such nondisclosed information would violate the rule of Gardner v. Florida, 430 U.S. 349 (1977). During the pendency of this appeal, we directed the judge who imposed the sentences in this case to state whether he did so based on any such nondisclosed information. We are satisfied from his response that there was no due process violation under Gardner.

The appellant advises us that Jeanette Armstrong, originally a co-defendant with him, was tried separately, convicted of two counts of second-degree murder and one count of robbery, and sentenced to three consecutive life sentences. He argues that his death sentences must be vacated because the jury was not advised of the ultimate disposition of the charges against Jeanette Armstrong.

In Messer v. State, 330 So.2d 137 (Fla. 1976), we vacated the sentence of death, partly on the ground that the court erred in refusing to permit the defendant to submit to the jury evidence of the plea-bargained conviction and sentence of the appellant's accomplice. Any evidence reasonably related to a valid mitigating consideration should, when profferred by the defendant, be admitted into evidence at the sentencing phase of a capital felony trial. See, e.g., Miller v. State, 332 So.2d 65 (Fla. 1976). Appellant did not proffer the evidence in question. Therefore, even assuming the information had some valid mitigating value, we can find no trial court error under the Messer rule.

Appellant contends that since the evidence does not establish that he intended to take life, the death penalty is impermissible under the eighth amendment ban on cruel and unusual punishment. Appellant offers us no binding legal authority that directly supports this proposition, and we therefore reject it.

After the sentencing hearing was held and sentencing arguments presented to the jury, the jury recommended a sentence of death. The trial judge sentenced appellant to death and subsequently put his findings and considerations in writing as follows:

> In accordance with the mandate of the Florida Supreme Court the Court makes the following findings of fact:
>
> 1. As an aggravated circumstance, the capital felony, that is, the murders of Thomas Henry Kersey, aged 86 years and his wife Eunice Maye Kersey, aged 74, were committed while the defendant Enmund was engaged, or was an accomplice, in the commission of or an attempt to commit an armed robbery. FS 921.141(5)(d).
>
> 2. As a further aggravating circumstance, the Court finds that the capital felony was committed for pecuniary gain. FS 921.141(5)(f). The evidence is abundantly clear that the armed robbery was committed for pecuniary gain and that the defendant Enmund was previously aware that Mr. Kersey had a reputation for keeping large sums of money on his person. The defendant Enmund actually saw Mr. Kersey with money, and the testimony amply indicates that the armed robbery of April 1, 1975, was planned ahead of time by the defendant Enmund.
>
> 3. As a further aggravating circumstance, the Court finds that the capital felony was especially heinous, atrocious, or cruel. FS 921.141(5)(h). The evidence amply supports a finding that the killing of Mr. Kersey aged 86, and Mrs. Kersey aged 74, was not a spontaneous matter. A reasonable person must conclude that the killings were done for no other purpose than to eliminate Mr. and Mrs. Kersey as witnesses to the armed robbery. The killings were premeditated in that Mr. Kersey was shot two (2) times and Mrs. Kersey was shot six (6) times. Two (2) bullets were subsequently recovered from the house, one (1) in the water heater and one (1) in the doorjamb. The medical examiner testified that in his opinion the bodies had to have been shot while in a prone position (his alternative explanation was that someone could have stood on a roof and shot down, or else tied the Kerseys' by their feet, hoisted them up and shot them from below). The entry of the bullets indicates that Mr. and Mrs. Kersey were in a prone position, that is, helpless to resist. The evidence indicates that Mrs. Kersey was shot first in the left side and that these wounds were not fatal, and that thereafter someone stood back and fired upon her prone body and then fired the bullets into the heater and the wall. Further, two (2) different weapons, that is, a .22 caliber weapon and a .38 weapon were fired at and into Mr. and Mrs. Kersey.
>
> Three individuals were charged with these crimes. The defendant Enmund and the defendant Sampson Armstrong were tried together and the defendant Jeanette Armstrong was tried separately. The Court knows from this trial and from the trial of Jeanette Armstrong that she was shot at the scene and sustained serious wounds. Since the defendant Jeanette Armstrong was seriously wounded and since

both Mr. and Mrs. Kersey were each shot with bullets from two (2) different caliber guns, and since the evidence establishes that Mr. and Mrs. Kersey were each shot while in the prone position, it is only reasonable to conclude, and the Court so finds, that the defendant Enmund and the defendant Sampson Armstrong, each fired into the bodies of Mr. and Mrs. Kersey.

4. As a further aggravating circumstance, the Court finds that the defendant Enmund was previously convicted of a felony involving the use or threat of violence to the person. FS 921.141(5)(b). At the advisory hearing the State introduced a certified copy of a Judgment and Committment[sic] from the United States District Court, Southern District of Georgia, establishing that on April 10, 1957, the defendant Enmund was convicted of two (2) separate offenses of robbery by the use of violance.

5. The other aggravating circumstances to-wit: FS 921.141(5)(a); 921.141(5)(c); 921.141(5)(e); and, 921.141(5)(g), are inapplicable in this case.

As to mitigating circumstances involving the defendant Earl Enmund, the Court finds that none of the statutory mitigating circumstances applied to this defendant:

1. In particular, the Court has considered FS 921.141(6)(a), and finds that the defendant has previously been convicted of the felony of robbery.

2. As to FS 921.141(6)(b), there is absolutely no evidence or suggestion that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

3. As to FS 921.141(6)(c), there is absolutely no evidence that the victims were a participant in the defendant's conduct or consented to the act.

4. As to FS 921.141(6)(d), the evidence clearly indicates that the defendant was an accomplice to the capital felony and that his participation in the capital felony was major. The defendant Enmund planned the capital felony and actively participated in an attempt to avoid detection by disposing of the murder weapons.

5. As to FS 921.141(6)(e), there is absolutely no evidence that defendant acted under extreme duress or under the substantial domination of another person.

6. As to FS 921.141(6)(f), there is absolutely no evidence that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

7. As to FS 921.141(6)(g), the defendant was 42 years of age at the time of this offense.

Therefore, in consideration of the evidence presented at trial and at the sentencing hearing as to the defendant Earl Enmund, the Court finds that the aggravating circumstances of these capital felonies outweigh the mitigating circumstances, and upon consideration thereof, the Court was of the opinion at the time of sentencing and is now, some

months later, that the sentence of death is justified and appropriate as to each Count of Murder in the First Degree.

The judge's findings that the capital felonies were committed in the course of robbery and that the capital felonies were committed for pecuniary gain both "refer to the same aspect of the defendant's crime." Provence v. State, 337 So.2d 783, 786 (Fla. 1976), cert. denied, 431 U.S. 969 (1977). The robbery circumstance and the pecuniary motive constitute "only one factor which we must consider in this case." Id. at 786. Where such double consideration of one factor appears to have impaired the process of weighing the aggravating circumstances against the mitigating circumstances, the sentence of death must be vacated. See Elledge v. State, 346 So.2d 998 (Fla. 1977). The "mere recitation of both circumstances does not in all cases call for a condemnation of the sentencing hearing and judgment." Hargrave v. State, 366 So.2d 1, 5 (Fla. 1978), cert. denied, 444 U.S. 919 (1979). Here, even absent the consideration of either of the factors of robbery and pecuniary gain, there remains one valid statutory aggravating circumstance to consider. There are no mitigating circumstances. The fact that the murders took place in the course of a robbery and that the criminal episode was motivated by pecuniary gain will therefore simply be treated as one factor.

The recited circumstance, that the murders were especially heinous, atrocious, and cruel, cannot be approved. Armstrong v. State, Case No. 48,516, (opinion filed March 26, 1981). However, there are two aggravating circumstances (robbery-pecuniary gain and previous conviction of a violent felony) and no mitigating circumstances. The jury recommended death. The finding that no mitigating circumstances were present was not error. Therefore, the sentence of death is appropriate and we approve it.

The judgment and sentences are affirmed.

It is so ordered.

SUNDBERG, C.J., ADKINS, BOYD and ENGLAND, JJ., Concur
OVERTON, J., Concurs in part and dissents in part with an opinion

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

OVERTON, J., concurring in part, dissenting in part.

I concur in affirming the conviction. I dissent in the sentence and would remand for resentencing in view of the specific finding of the majority that the appellant did not actually participate in the shooting. In his sentencing order the trial judge found to the contrary, expressing the view in his findings of aggravating circumstances that the appellant was present and assisted in the commission of the murder. In my opinion, these contrary findings require a resentencing proceeding.

An Appeal from the Circuit Court in and for Hardee County,

William A. Norris, Jr., Judge - Nos. 75-122 and 75-123

Jack O. Johnson, Public Defender; Steven H. Denman, W.C. McLain, and David A. Davis, Assistant Public Defenders, Bartow, Florida,

for Appellant

Jim Smith, Attorney General, Donald K. Budser and Charles A. Stampelos, Assistant Attorney Generals, Tallahassee, Florida,

for Appellee

IN THE SUPREME COURT OF FLORIDA

MONDAY, JULY 20, 1981

EARL ENMUND,	**	
Appellant,	**	CASE NO. 48,525
vs.	**	Circuit Court Case Nos. 75-122 & 75-123
STATE OF FLORIDA,	**	(Hardee)
Appellee.	**	

On consideration of the Motion for Rehearing filed by appellant and the Motion for Clarification filed by appellee,

IT IS ORDERED by the Court that said Motions be and the same are hereby denied.

SUNDBERG, C.J., ADKINS, BOYD and ENGLAND, JJ., Concur
OVERTON, J., Dissents

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Debbie Carnesale
Deputy Clerk

C
cc: Hon. Colemon W. Best, Clerk
Hon. William A. Norris, Jr., Judge

David A. Davis, Esquire
and W. C. McLain, Esquire
Lawrence A. Kaden, Esquire

A22

Item 2

Section 921.141, Florida Statutes (1975)

Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.--

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY. Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s.775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the porceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY. After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life *[imprisonment] or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH. Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s.775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE. The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the supreme court.

(5) AGGRAVATING CIRCUMSTANCES. Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES. Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

In the Circuit Court, for the Tenth Judicial Circuit of Florida,

County, SPRING Term, in the year of our Lord one thousand nine hundred and SEVENTY-FIVE

FILED
MAY 22 1975
BEN COX
CLERK CIRCUIT COURT
DEPUTY

The State of Florida

vs.

EARL ENMUND

#75-122

Indictment for

FIRST DEGREE MURDER

782.04(1) (Capital Felony)

TWO COUNTS

ROBBERY 813.011 (FELONY)

In the Name and by the Authority of the State of Florida:

The Grand Jurors of the State of Florida, empaneled and sworn to inquire and true presentment make in and for the County of HARDEE upon their oath do present that EARL ENMUND of the County of HARDEE and State of Florida, on the 1st day of April in the year of our Lord one thousand nine hundred and Seventy-Five in the County and State aforesaid unlawfully and from a premeditated design to effect the death of Thomas Henry Kersey, did inflict mortal wounds upon the said Thomas Henry Kersey, by shooting him with a firearm, a further description of which is to the Grand Jurors unknown, from which mortal wounds the said Thomas Henry Kersey did languish and die on the 1st day of April, 1975, contrary to the statute in such cases made and provided, and against the peace and dignity of the State of Florida.

COUNT TWO

IN THE NAME AND BY THE AUTHROITY OF THE STATE OF FLORIDA:

The Grand Jurors of the State of Florida, empaneled and sworn to inquire and true presentment make in and for the County of HARDEE upon their oath do present that EARL ENMUND of the County of HARDEE and State of Florida, on the 1st day of April in the year of our Lord one thousand nine hundred and seventy-five in the County and State aforesaid unlawfully and from a premeditated design to effect the death of Eunice Mae Kersey, did inflict mortal wounds upon the said Eunice Mae Kersey, by shooting her with a firearm, a further

A TRUE BILL _____, Foreman of Grand Jury

Presented in Open Court this _____ day of _____, 19____

ITEM 4

COUNT TWO COUNTINUED

description of which is to the Grand Jurors unknown, fromwhich mortal wounds the said Eunice Mae Kersey did languish and die on the 1st day of April, 1975, contrary to the statute in such cases made and provided, and against the peace and dignity of the State of Florida.

COUNT THREE

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

The Grand Jurors of the State of Florida, empaneled and sworn to inquire and true presentment make in and for the County of HARDEE upon their oath do present that EARL ENMUND of the County of HARDEE and State of Florida, on the 1st day of April in the year of our Lord one thousand nine hundred and seventy-five in the County and State aforesaid unlawfully by force, violence or assault or putting in fear did feloniously rob, steal and take away from the person or custody of Thomas Henry Kersey money or other property the subject of larceny, by the use of a firearm, to-wit: cash, in currency and coin of the United States of America, the property of Thomas Henry Kersey, with intent permanently to deprive the owner of his property, and the said Thomas Henry Kersey was then and there entitled to the possession of the said cash as against the defendant EARL ENMUND was not then and there the owner or entitled to possession of said cash, in violation of Section 813.011, Florida Statutes.

A TRUE BILL _____, Foreman of Grand Jury

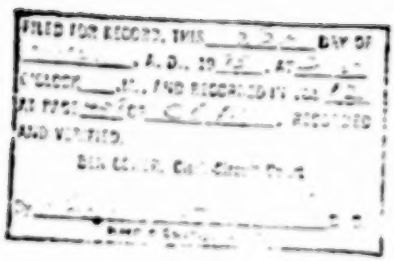
Presented in Open Court this 22nd day of May, 1975.

STATE OF FLORIDA

COUNTY OF HARDEE

The undersigned State Attorney states that he as State Attorney of the Tenth Judicial Circuit in and for Hardee County, Florida, as authorized and required by law, has advised the Grand Jury returning this Indictment.

Glen Darty, as State Attorney
Tenth Judicial Circuit



IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR HARDEE COUNTY, FLORIDA

SEPTEMBER TERM 19 75

CASE NO. 75-122

STATE OF FLORIDA

vs

Earl Enmund
Defendant

FILED
SEP 30 1975
CLERK, CIRCUIT COURT

JUDGMENT AND SENTENCE

The Defendant EARL ENMUND being personally before this Court, represented by MICHAEL TROMBLEY, his attorney of record, having been tried and found guilty of the crime of / entered a plea of guilty to the crime of / entered a plea of Nolo Contendere to the crime of COUNT I. FIRST DEGREE MURDER. COUNT II. FIRST DEGREE MURDER. COUNT III. ROBBERY

and the Court having inquired and given the Defendant an opportunity to be heard and show cause why he should not be adjudged guilty and sentenced as provided by law, including an opportunity to offer matters in mitigation of sentence, and no cause being shown, it is thereupon:

Ordered that the Defendant EARL ENMUND is hereby adjudicated guilty of the crime of *. It is the sentence of the law that said Defendant be committed to the custody of the Department of Offender Rehabilitation of the State of Florida, to be imprisoned at hard labor for the term of ** in the institution in the State Correctional System to which said Department may cause you to be confined. (The Court recommends that you be confined at type institution.)

It is further ordered that you shall be allowed 153 DAYS credit for such time as you have been incarcerated prior to the imposition of this sentence for this offense. (No credit should be allowed if the Defendant is already under sentence or if credit has been previously given for another offense. Strike if not applicable.)

It is further ordered that this sentence is (concurrent)(consecutive) with the sentence imposed for the crime of in Case . County, No. .(Strike if not applicable.)

It is further ordered that the Sheriff of HARDEE County, Florida, is hereby ordered and directed to deliver said Defendant to the Department of Offender Rehabilitation together with a copy of this Judgment and Sentence. It is further ordered and adjudged that said Defendant shall pay the sum of One Dollar ($1.00) pursuant to Section 943.24, Florida Statutes.

The Defendant in Open Court was advised of his right to appeal from this Judgment and Sentence within thirty days from this date, and the Defendant's entitlement to the assistance of counsel in taking said appeal upon a showing that said Defendant was entitled to an attorney at the expense of the State.

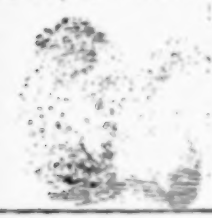
*FIRST DEGREE MURDER, ON BOTH OF THE TWO COUNTS, AND COUNT III, ROBBERY.

** THE REST OF YOUR NATURAL LIFE, FOR COUNT III, TO RUN CONCURRENT WITH COUNTS I AND II.
OR COUNTS I AND II, TO BE TRANSPORTED TO STATE PRISON TO BE PUT TO DEATH BY ELECTROCUTION.

The following are the fingerprints of the above-named Defendant,

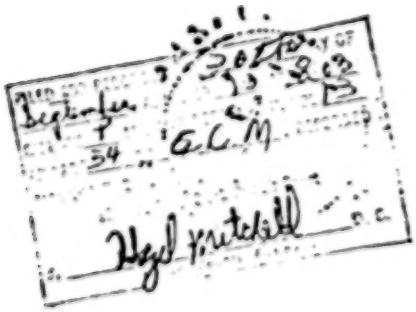
Earl Enmund :

(FINGERPRINTS)

1. Right Thumb	2. Right Index	3. Right Middle	4. Right Ring	5. Right Little
				
6. Left Thumb	**7. Left Index**	**8. Left Middle**	**9. Left Ring**	**10. Left Little**
				

DONE AND ORDERED IN Open Court at HARDEE County, Florida, this 30th day of SEPTEMBER A.D. 19 75. I HEREBY CERTIFY that the above and foregoing fingerprints on this Judgment and Sentence are the fingerprints of the Defendant, EARL ENMUND and that they were placed thereon by said Defendant in my presence in Open Court this date.

William A Jones
JUDGE



81-5321

IN THE

SUPREME COURT OF THE UNITED STATES

RECEIVED
AUG 27 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Case No.

EARL ENMUND,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioner, EARL ENMUND, through his undersigned counsel and pursuant to United States Supreme Court Rule 46, asks this Court for leave to proceed in forma pauperis. The Petitioner has been represented by appointed counsel throughout his state court appeal proceedings, and his Affidavit in support of this Motion is attached.

Respectfully submitted,

WILLIAM C. McLAIN
Assistant Public Defender
495 N. Carpenter Street
Bartow, Florida 33830
(813)533-6715 or 533-1184

BY: William C. McLain
WILLIAM C. McLAIN
Attorney for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES

EARL ENMUND,	:	
Petitioner,	:	
vs.	:	Case No.
STATE OF FLORIDA,	:	
Respondent.	:	
	:	

AFFIDAVIT IN SUPPORT OF PETITIONER'S MOTION TO PROCEED IN FORMA PAUPERIS

I, EARL ENMUND, being first duly sworn, depose and say that I am the Petitioner in the above styled case; that in support of my motion to proceed on my Petition for Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or give security therefore; and that I believe I am entitled to redress upon the issues presented in the Petition for Writ of Certiorari.

I further swear that:

1. I was convicted on September 30, 1975, in the Circuit Court for Hardee County, Florida, for first degree murder and robbery in a single jury trial.

2. I received a sentence of death for first degree murder and am presently in custody on Death Row at Florida State Prison.

3. I appealed to the Supreme Court of Florida and that Court affirmed all of my convictions and sentences.

4. I am not employed and have no source of income.

5. I do not have any real estate, stocks, bonds, notes, automobiles or any other valuable property.

6. I have been represented by appointed counsel throughout my state appeal proceedings.

I understand that a false statement or answer to any question in this Affidavit will subject me to penalties for perjury.

Earl Enmund
EARL ENMUND

Subscribed and sworn to before me this 13 day of August, 1981.

D. E. Lee
Notary Public

My Commission Expires:

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES MAR. 26, 1984

Office - Supreme Court
FILED
NOV 12 1981
ALEXANDER L. STEVAS
CLERK

No. 81-5321

In the Supreme Court of the United States

OCTOBER TERM, 1981

EARL ENMUND,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

JOINT APPENDIX

WILLIAM C. McLAIN
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Hall of Justice Annex
495 N. Carpenter Street
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(813) 533-6715
Counsel for Petitioner

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Assistant Attorney General
The Capitol, 1502
Tallahassee, FL 32301
(904) 488-0600
Counsel for Respondent

PETITION FOR CERTIORARI FILED AUGUST 27, 1981
CERTIORARI GRANTED OCTOBER 19, 1981

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[R 8]

IN THE CIRCUIT COURT
FOR THE TENTH JUDICIAL CIRCUIT OF FLORIDA
HARDEE COUNTY

Spring Term, in the Year of Our Lord
One Thousand Nine Hundred and Seventy Five

#75-122

THE STATE OF FLORIDA

v.

EARL ENMUND

INDICTMENT FOR FIRST DEGREE MURDER

782.04(1) (Capital Felony)

TWO COUNTS

ROBBERY 813.011 (FELONY)

In the Name and by the Authority of the State of Florida:

The Grand Jurors of the State of Florida, empaneled and sworn to inquire and true presentment make in and for the County of HARDEE upon their oath do present that EARL ENMUND of the County of HARDEE and State of Florida, on the 1st day of April in the year of our Lord one thousand nine hundred and Seventy-Five in the County and State aforesaid unlawfully and from a premeditated design to affect the death of Thomas Henry Kersey, did inflict mortal wounds upon the said Thomas Henry Kersey, by shooting him with a firearm,

a further description of which is to the Grand Jurors unknown, from which mortal wounds the said Thomas Henry Kersey did languish and die on the 1st day of April, 1975, contrary to the statute in such cases made and provided, and against the peace and dignity of the State of Florida.

COUNT TWO

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

The Grand Jurors of the State of Florida, empaneled and sworn to inquire and true presentment make in and for the County of HARDEE upon their oath do present that EARL ENMUND of the County of HARDEE and State of Florida, on the 1st day of April in the year of our Lord one thousand nine hundred and seventy-five in the County and State aforesaid unlawfully and from a premeditated design to effect the death of Eunice Mae Kersey, did inflict mortal wounds upon the said Eunice Mae Kersey, by shooting her with a firearm, a further

[R 9]

description of which is to the Grand Jurors unknown, from which mortal wounds the said Eunice Mae Kersey did languish and die on the 1st day of April, 1975, contrary to the statute in such cases made and provided, and against the peace and dignity of the State of Florida.

COUNT THREE

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The Grand Jurors of the State of Florida, empaneled and sworn to inquire and true presentment make in and for the County of HARDEE upon their oath do present that EARL ENMUND of the County of HARDEE and

State of Florida, on the 1st day of April in the year of our Lord one thousand nine hundred and seventy-five in the County and State aforesaid unlawfully by force, violence or assault or putting in fear did feloniously rob, steal and take away from the person or custody of Thomas Henry Kersey money or other property the subject of larceny, by the use of a firearm, to-wit: cash, in currency and coin of the United States of America, the property of Thomas Henry Kersey, with intent permanently to deprive the owner of his property, and the said Thomas Henry Kersey was then and there entitled to the possession of the said cash as against the defendant EARL ENMUND was not then and there the owner or entitled to possession of said cash, in violation of Section 813.011, Florida Statutes.

A TRUE BILL /s/ [Illegible], Foreman of Grand Jury
Presented in Open Court this 22nd day of May, 1975.

[R 10]

STATE OF FLORIDA

COUNTY OF HARDEE

The undersigned State Attorney states that he as State Attorney of the Tenth Judicial Circuit in and for Hardee County, Florida, as authorized and required by law, has advised the Grand Jury returning this Indictment.

/s/ Glen Darty
GLEN DARTY
As State Attorney
Tenth Judicial Circuit

[R 1602]

THE COURT: Please be seated.
Ladies and gentlemen of the Jury:

You have listened carefully to the evidence and the testimony in this case and to the argument of counsel. And I now ask that you give the same careful and close attention to the law which I have determined to

[R 1603]

be applicable to this case.

You alone, as jurors in this case, are sworn to pass on the issues of fact. And your verdict or verdicts in this case must be based solely on the evidence or lack of evidence and on the law as the law is now given to you by the Court.

These Defendants are charged, each of them, with three separate criminal offenses. Count One of the Indictment charges each of these Defendants with the first degree murder of Thomas Henry Kersey. Count Two of the Indictment charges each of these Defendants with first degree murder of Eunice Mae Kersey. Count Three of the Indictment charges each of these Defendants with the offense of robbery from Thomas Henry Kersey.

Now, a separate crime is charged against each of these Defendants in each count of the Indictment. Each crime and the evidence applicable to it and as it applies to each Defendant must be considered by you separately. The fact that you may find both or one of the Defendants guilty of one of the crimes charged must not affect your verdict with respect to the other Defendant or the other crimes charged.

Now, we will take these crimes as they appear in the Indictment. And each crime mentioned contains multiple lesser and included offenses. First,

[R 1604]

as to the crime of murder in the first degree: The killing of one human being by another is called homicide. Every homicide falls within one of these four classes: justifiable homicide, excusable homicide, murder in the first, second or third degree, and manslaughter. The circumstances of each case determine whether homicide is justifiable, excusable, murder or manslaughter.

Justifiable homicide and excusable homicide are lawful. Murder and manslaughter are unlawful and constitute violations of the criminal laws.

The essential elements of unlawful homicide, together with other matters that must be proved beyond and to the exclusion of every reasonable doubt in this case, before there can be a conviction, are: one, the death of the person alleged to have been killed; two, that such death was caused by the criminal act or agency of another; three, that the deceased was killed by the accused.

The killing of a human being by any person is justifiable homicide and lawful when committed in resisting an attempt to murder such person or to commit any felony upon him or when committed in the lawful defense of such person where there shall be reasonable ground to apprehend a design to commit a felony or do some great personal injury, and there shall be imminent

[R 1605]

danger of such design being accomplished or when necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed or in lawfully suppressing a riot, or in lawfully keeping and preserving peace.

A homicide committed in self defense, that is, in the defense of the life of the accused or to protect his person from imminent danger of death or great bodily harm, is a justifiable homicide and lawful.

Excusable homicide is homicide which is committed by accident and misfortune in doing any lawful act by law-

ful means with usual, ordinary caution and without any unlawful intent, or by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner.

Now, ladies and gentlemen, murder in the first degree.

Murder in the first degree is the unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being or when committed by a person engaged in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary or kidnaping, aircraft

[R 1606]

piracy or unlawful throwing, placing or discharging of a destructive device or bomb, or when resulting from the unlawful distribution of heroin by a person over the age of seventeen years when such drug is proven to be the proximate cause of the death of the user. That is the statutory definition of murder in the first degree.

The killing of a human being while engaged in the perpetration of or in the attempt to perpetrate the offense of robbery is murder in the first degree even though there is no premeditated design or intent to kill.

Murder in the second degree is the killing of a human being by the perpetration of an act imminently dangerous to another and evincing a depraved mind regardless of human life although without a premeditated design to effect the death of any particular individual, or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, kidnaping, aircraft piracy or unlawful throwing or placing or discharging of a destructive device or bomb except as provided in murder in the first degree.

An act is one imminently dangerous to another and evincing a depraved mind regardless of human life if it

is an act or series of acts if, first, a person of ordinary judgment would know it is reasonably

[R 1607]

certain to kill or do serious bodily injury to another, or, two, is done from ill-will, hatred, spite or evil intent, and, three, is one of such a nature that the act itself indicates an indifference to human life.

Murder in the third degree is the unlawful killing of a human being when perpetrated without any design to effect death by a person engaged in the commission of any felony other than arson, rape, robbery, burglary, kidnaping, aircraft piracy or unlawful throwing, placing or discharging of a destructive device or bomb.

A felony is a crime punishable by death or imprisonment in the State penitentiary.

A person is engaged in the commission of a felony when doing an act which is a part of the felony or necessary to the completion of the course of action constituting the felony or while escaping from the immediate scene of the felony.

Manslaughter is the killing of a human being by the act, procurement or culpable negligence of another or in cases where such killing shall not be justifiable or excusable homicide or murder.

Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a

[R 1608]

reasonably careful person would not do under like circumstances or in failing to do something that a reasonably careful person would do under like circumstances. Culpable negligence is the conscious doing of an act or following a course of conduct which any reasonable per-

son would know would likely result in death or great bodily injury to some other person when this is done without the intent to injure any person but with utter disregard of the safety of others.

Now, let me summarize the elements of homicide.

The essential elements of an unlawful homicide which must be proved beyond a reasonable doubt in this case before there can be a conviction of any offense are as follows:

First, that the deceased is, in fact, dead.

Two, that the deceased was killed by the defendant or by someone acting in consort with the defendant.

Three, that the killing was neither justifiable nor excusable homicide.

If these elements are established, then it will be necessary for you to determine the degree of unlawful homicide.

If the defendant, in killing the deceased,

[R 1609]

did so while engaged in the perpetration of or in an attempt to perpetrate the crime of robbery as I will later define robbery for you, then, he should be found guilty of murder in the first degree. If the killing was not from a premeditated design to effect the death of any human being but was in the perpetration of or an act imminently dangerous to another evincing a depraved mind regardless of human life although without premeditated design to effect the death of any particular human being or when committed in the perpetration of or attempt to perpetrate an arson, rape, robbery, burglary, kidnaping, aircraft piracy, or in the unlawful throwing or placing or discharging of a destructive device or bomb, then that is murder in the second degree.

At this point let me distinguish between two elements of the felony murder aspect of murder in the first degree and in the second degree.

In order to sustain a conviction of first degree murder while engaging in the perpetration of or in the attempted perpetration of the crime of robbery, the evidence must establish beyond a reasonable doubt that the defendant was actually present and was actively aiding and abetting the robbery or attempted robbery, and that the unlawful killing occurred in the perpetration of or in the attempted perpetration of the robbery.

[R 1610]

In order to sustain a conviction of second degree murder while engaged in the perpetration of or the attempted perpetration of robbery, the evidence must establish beyond a reasonable doubt that the unlawful killing was committed in the perpetration of or in the attempted perpetration of robbery, and that the defendant actually, although not physically present at the time of the commission of the offense, did, nonetheless, procure, counsel, command or aid another to commit the crime.

Now, if the killing took place while the defendant was engaged in the commission of a felony other than arson, rape, robbery, burglary, kidnaping, aircraft piracy or unlawful throwing, placing or discharging of a destructive device or bomb, the defendant should be found guilty of murder in the third degree.

If the killing was by the act, procurement or culpable negligence of the defendant and was not murder in any degree or justifiable homicide or excusable homicide, the defendant should be found guilty of manslaughter.

Of course, as to Count One and Count Two of the Indictment, if any one of these elements of unlawful homicide has not been proved beyond a reasonable doubt, then the defendant should be found not guilty.

Now, as to Count One and Count Two of the Indictment, therefore, the offense charged within those

[R 1611]

counts are murder in the first degree or murder in the second degree or murder in the third degree or manslaughter or, of course, if there is no evidence beyond a reasonable doubt of any of the degrees of unlawful homicide, then, of course, there will be a verdict of not guilty.

Count Three of the Indictment charges the offense of robbery. Let me define robbery for you, and this definition of robbery is also applicable to the definition of robbery and felony murder and definition of first and second degree murder.

It is a crime of robbery for any person by force, violence or assault or putting in fear to rob, steal and take away from the person or custody of another any money or other personal property of any value whatsoever.

The essential elements of this offense which must be proved beyond a reasonable doubt before there can be a conviction in this case as to the robbery or to the felony murder portions of first and second degree murders are: one, the defendant did take from the person or immediate custody of the victim the property described in the information, that is, currency of the United States; two, the property was taken against the will of the victim and was taken by means of force, violence or assault or by putting the victim in fear; three, the taking was with

[R 1612]

the intent to permanently deprive the owner of the use of the property taken.

Now, the property taken must be of some value, but the extent of the value makes no difference in determining guilt of the crime of robbery.

The taking must be by the use of force or violence or by assault so as to overcome the resistance of the victim or by putting the victim in fear so that he does not resist. The law does not require that the victim of robbery resist

to any particular extent or that he offer any actual physical resistance if the circumstances are such that he is placed in fear of death or great bodily harm if he does resist. But unless prevented by fear there must be some resistance to make the taking one done by force or violence.

In order for a taking by force or violence or by assault to be by robbery it is not necessary the taking be from the person of the victim. It is sufficient if the property be in the presence of or under the immediate or actual control of the victim so that it cannot be taken without the use of force, violence or intimidation directed against the victim.

Now, the crime of robbery includes several lesser included offenses. Bear with us.

Robbery includes the lesser offense of

[R 1613]

assault with intent to commit robbery, attempted robbery, aggravated assault, assault and battery, bare assault, and petit larceny. I must define those for you.

It is a crime for any person to attempt to commit an offense prohibited by law and in such attempt do any act toward the commission of such offense.

The charge of robbery includes the lesser offense of an attempt to commit that crime.

An attempt to commit a crime consists of the formation of intention to commit that particular crime at that particular time and place, and the doing of some physical act toward and which was intended to accomplish the commission of the crime. The act done must be more than mere preparation to commit the crime. It must be one intended to actually do the wrong which constitutes the crime.

The crime of robbery also includes a lesser offense of assault with intent to commit that crime.

An assault is an intentional, unlawful threat by word or act to do violence to the person of another coupled with an apparent ability to do so, and doing some act which creates a well-founded fear of such violence being done.

An assault with intent to commit a crime upon another person consists of making assault upon that

[R 1614]

person by one having at the time of making the assault a fully-formed, conscious intent to commit that crime upon that person.

Robbery also includes the lesser included offense of aggravated assault. That is assault with a deadly weapon.

It is a crime to commit an aggravated assault upon another. An aggravated assault is an assault with a deadly weapon.

Assault is a threat by word or act to do violence to the person of another coupled with the apparent ability to do so, and doing some act which creates a well-founded fear of such violence being done.

Also, as to the offense of assault and battery.

It is a crime to make assault upon another. Assault and battery is an intentional and unlawful doing of violence to the person of another. It is not necessary that there be any serious or permanent injury, but there must be some actual intentional unlawful touching or striking of the person assaulted, and the act must be done against the will of the person assaulted.

And, of course, it is a crime to make a bare assault upon another. That is simple assault. Bare assault is simple assault.

[R 1615]

Bare assault is an intentional unlawful threat by word or act to do violence to the person of another coupled

with the apparent ability to do so, and doing some act which creates a well-founded fear of such violence being done.

And lastly, within the offense of robbery is the offense of petit larceny.

Petit larceny is the taking and carrying away and stealing of the personal property of another with the intent to deprive the owner permanently of his property and of a value of less than $100.00.

So, as to Count Three, just to bring it all back together, now, you have got the offense of robbery. Included within that offense would be the lesser included offenses of assault with—excuse me—of attempted robbery, assault with intent to commit robbery, aggravated assault, assault and battery, bare assault, and petit larceny.

Now, that ends my instructions on the criminal offenses comprehended by this Indictment. When I complete all my instructions I will suggest to you a method by which you might want to approach the analysis of all these offenses.

I now will get into the general instructions. Before I do, let's stand and stretch a minute.

[GENERAL INSTRUCTIONS OMITTED]

* * * * *

[R 1631]

THE COURT: Bring the Jury back, please.

(Thereupon the Jury returned to the courtroom.)

THE COURT: All right. Be seated, please.

Who is your foreman?

MR. SHACKLEFORD: I am, your Honor.

THE COURT: Mr. Shackleford, I understand you have a request for further instructions; is that correct?

MR. SHACKLEFORD: Yes.

THE COURT: All right, sir. And you wish to be instructed on the law of homicide?

MR. SHACKLEFORD: On the difference between

[R 1632]

first degree and second degree.

THE COURT: All right. If you will, be seated.

Although you have a specific request for only a portion of the instructions, under the law, the case law, I must re-instruct you on the entire law of homicide.

The killing of one human being by another is called homicide. Every homicide falls within one of these four classes: justifiable homicide, excusable homicide, murder in the first, second or third degree, and manslaughter. The circumstances of each case determine whether homicide is justifiable, excusable, murder or manslaughter.

Justifiable homicide and excusable homicide are lawful; murder and manslaughter are unlawful and constitute violations of the criminal laws.

The essential elements of unlawful homicide, together with other matters that must be proved beyond and to the exclusion of every reasonable doubt in this case, before there can be a conviction, are: one, the death of the person alleged to have been killed; two, that such death was caused by the criminal act or agency of another; three, that the deceased was killed by the accused.

[R 1633]

The killing of a human being by any person is justifiable homicide and lawful when committed in resisting an attempt to murder such person or to commit any felony upon him or when committed in the lawful defense of such person where there shall be reasonable ground to apprehend a design to commit a felony or do some great personal injury, and there shall be imminent danger of such design being accomplished or when necessarily committed in attempting by lawful ways and means to appre-

hend any person for any felony committed or in lawfully suppressing a riot, or in lawfully keeping and preserving peace.

A homicide committed in self defense, that is, in the defense of the life of the accused or to protect his person from imminent danger of death or great bodily harm, is a justifiable homicide and lawful.

Excusable homicide is homicide which is committed by accident and misfortune in doing any lawful act by lawful means with usual, ordinary caution and without any unlawful intent, or by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner.

Now, ladies and gentlemen, murder in the

[R 1634]

first degree.

Murder in the first degree is the unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being or when committed by a person engaged in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary or kidnaping, aircraft piracy or unlawful throwing, placing or discharging of a destructive device or bomb, or when resulting from the unlawful distribution of heroin by a person over the age of seventeen years when such drug is proven to be the proximate cause of the death of the user. That is the statutory definition of murder in the first degree.

The killing of a human being while engaged in the perpetration of or in the attempt to perpetrate the offense of robbery is murder in the first degree even though there is no premeditated design or intent to kill.

Murder in the second degree is the killing of a human being by the perpetration of an act imminently dangerous to another and evincing a depraved mind regardless

of human life although without a premeditated design to effect the death of any particular individual, or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, kidnaping,

[R 1635]

aircraft piracy or unlawful throwing or placing or discharging of a destructive device or bomb except as provided in murder in the first degree.

An act is one imminently dangerous to another and evincing a depraved mind regardless of human life if it is an act or series of acts if, first, a person of ordinary judgment would know it is reasonably certain to kill or do serious bodily injury to another, or, two, is done from ill-will, hatred, spite or evil intent, and, three, is one of such a nature that the act itself indicates an indifference to human life.

Murder in the third degree is the unlawful killing of a human being when perpetrated without any design to effect death by a person engaged in the commission of any felony other than arson, rape, robbery, burglary, kidnaping, aircraft piracy or unlawful throwing, placing or discharging of a destructive device or bomb.

A felony is a crime punishable by death or imprisonment in the State penitentiary.

A person is engaged in the commission of a felony when doing an act which is a part of the felony or necessary to the completion of the course of action constituting the felony or while escaping from the immediate scene of the felony.

Manslaughter is the killing of a human being

[R 1636]

by the act, procurement or culpable negligence of another or in cases where such killing shall not be justifiable or excusable homicide or murder.

Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances or in failing to do something that a reasonably careful person would do under like circumstances. Culpable negligence is the conscious doing of an act or following a course of conduct which any reasonable person would know would likely result in death or great bodily injury to some other person when this is done without the intent to injure any person but with utter disregard of the safety of others.

Now, let me summarize the elements of homicide.

The essential elements of an unlawful homicide which must be proved beyond a reasonable doubt in this case before there can be a conviction of any offense are as follows:

First, that the deceased is, in fact, dead.

Two, that the deceased was killed by the defendant or by someone acting on consort with the defendant.

[R 1637]

Three, that the killing was neither justifiable nor excusable homicide.

If these elements are established, then it will be necessary for you to determine the degree of unlawful homicide.

If the defendant, in killing the deceased, did so while engaged in the perpetration of or in an attempt to perpetrate the crime of robbery as I will later define robbery for you, then, he should be found guilty of murder in the first degree.

If the killing was not from a premeditated design to effect the death of any human being but was in the perpetration of or an act imminently dangerous to another evincing a depraved mind regardless of human life al-

though without premeditated design to effect the death of any particular human being or when committed in the perpetration of or attempt to perpetrate an arson, rape, robbery, burglary, kidnaping, aircraft piracy, or in the unlawful throwing or placing or discharging of a destructive device or bomb, then that is murder in the second degree.

At this point let me distinguish between two elements of the felony murder aspect of murder in the first degree and in the second degree.

In order to sustain a conviction of first

[R 1638]

degree murder while engaging in the perpetration of or in the attempted perpetration of the crime of robbery, the evidence must establish beyond a reasonable doubt that the defendant was actually present and was actively aiding and abetting the robbery or attempted robbery, and that the unlawful killing occurred in the perpetration of or in the attempted perpetration of the robbery.

In order to sustain a conviction of second degree murder while engaged in the perpetration of or the attempted perpetration of robbery, the evidence must establish beyond a reasonable doubt that the unlawful killing was committed in the perpetration of or in the attempted perpetration of robbery, and that the defendant actually, although not physically present at the time of the commission of the offense, did, nonetheless, procure, counsel, command or aid another to commit the crime.

Now, if the killing took place while the defendant was engaged in the commission of a felony other than arson, rape, robbery, burglary, kidnaping, aircraft piracy or unlawful throwing, placing or discharging of a destructive device or bomb, the defendant should be found guilty of murder in the third degree.

If the killing was by the act, procurement or culpable negligence of the defendant and was not murder in any degree or justifiable homicide or excusable homicide,

[R 1639]

the defendant should be found guilty of manslaughter.

Of course, as to Count One and Count Two of the Indictment, if any one of these elements of unlawful homicide has not been proved beyond a reasonable doubt, then the defendant should be found not guilty.

Now, as to Count One and Count Two of the Indictment, therefore, the offense charged within those counts are murder in the first degree or murder in the second degree or murder in the third degree or manslaughter or, of course, if there is no evidence beyond a reasonable doubt of any of the degrees of unlawful homicide, then, of course, there will be a verdict of not guilty.

Okay. You may now retire to further consider your verdict.

• • • • •

[R 1685]

THE COURT: All right.

Ladies and gentlemen of the Jury, once again, you know what your responsibility today is at this portion of the trial. You are serving now as advisors to the Court and as advisors to the Court it will be your responsibility to make a recommendation. But the Court has the final discretion, responsibility, in this matter, and I have the power of independent judgment. Under these procedures, therefore, it is now your duty and responsibility to determine by a majority vote whether or not you advise

[R 1686]

the imposition of the death penalty based upon, one, whether sufficient aggravating circumstances as hereafter enumerated exist to justify the death penalty; two, whether sufficient mitigating circumstances exist as hereafter enumerated which outweigh the aggravating circumstances found to exist; and, thirdly, based upon these

considerations, whether the Defendants should be sentenced to life or death.

Aggravating circumstances are limited by Statute to the following:

(A) The capital felony was committed by a person under sentence of imprisonment.

(B) The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to the person.

(C) The defendant knowingly created a great risk of death to many persons.

(D) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of or an attempt to commit or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnaping, aircraft piracy or the unlawful throwing or placing or discharging of a destructive device or bomb.

(E) The capital felony was committed for

[R 1687]

the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(F) The capital felony was committed for pecuniary—again, that means for money—or other valuable consideration.

(G) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(H) The capital felony was especially heinous, atrocious or cruel.

Mitigating circumstances by Statute are:

(A) The defendant has no significant history of prior criminal activity.

(B) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(C) The victim was a participant in the defendant's conduct or consented to the act.

(D) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(E) The defendant acted under extreme duress or under the substantial domination of another person.

(F) Capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct

[R 1688]

to the requirements of law was substantially impaired. And,

(G) The age of the defendant at the time of the crime.

Now, your determination and recommendation must be made objectively as it relates to each Defendant without bias or prejudice either for or against the State or for or against either one of these Defendants.

Now, you will have two forms of verdict as to each count and as to each Defendant. There are two counts of first degree murder. Your advisory sentence as to Count One, and this will be the one as it relates to Earl Enmund: We, the Jury, have heard evidence under the sentencing procedure in the above cause as to whether aggravating circumstances which were so defined in the Court's charge existed in the capital offense here involved and whether sufficient mitigating circumstances defined by the Court's charge do outweigh such aggravating circumstances, and we do find and advise that the aggravating circumstances do outweigh the mitigating circumstances. A majority of at least seven of us, therefore, advise the Court that the death penalty should be imposed herein upon the Defendant by the Court as to Count One.

Then, as to each count, you have the reverse,

[R 1689]

whether at least five—excuse me—at least seven of you find that the mitigating circumstances outweigh the aggravating circumstances.

All right. Members of the Jury, first of all, before you retire, are there any objections or corrections to the Court's instructions from the State?

MR. WILCOX: No, your Honor.

THE COURT: From Defendant Sampson Armstrong?

MR. ANDERSON: Yes, your Honor. I have one objection and correction.

I think when you were listing the mitigating circumstances, Subparagraph (A), you read the defendant has no subsequent history or no criminal activity. I think it should have been instead of or.

MR. WILCOX: I heard the same thing Mr. Anderson did.

MR. ANDERSON: I am sure it is just a mistake.

THE COURT: All right. Let me read it again.

The defendant has no significant history of prior criminal activity.

[R 107]

IN THE CIRCUIT COURT OF
HARDEE COUNTY, FLORIDA

Case No. 75-122

STATE OF FLORIDA

vs.

EARL ENMUND

ADVISORY SENTENCE—COUNT I

We, the jury, have heard evidence under the sentencing procedure in the above cause, as to whether aggravating circumstances, which were so defined in the Court's charge, existed in the capital offense here involved, and whether sufficient mitigating circumstances as defined in the Court's charge to outweigh such aggravating circumstances, do find and advise that the aggravating circumstances do outweigh the mitigating circumstances.

A majority of at least seven (7) of us, therefore, advise the Court that the death penalty should be imposed herein upon the defendant by the Court as to Count I.

/s/ Marcus D. Shackleford
Foreman

Wauchula, Florida
September 30, 1975

[R 108]

IN THE CIRCUIT COURT OF
HARDEE COUNTY, FLORIDA

Case No. 75-122

STATE OF FLORIDA

vs.

EARL ENMUND

ADVISORY SENTENCE—COUNT II

We, the jury, have heard evidence under the sentencing procedure in the above cause, as to whether aggravating circumstances, which were so defined in the Court's charge, existed in the capital offense here involved, and whether sufficient mitigating circumstances as defined in the Court's charge to outweigh such aggravating circumstances, do find and advise that the aggravating circumstances do outweigh the mitigating circumstances.

A majority of at least seven (7) of us, therefore, advise the Court that the death penalty should be imposed herein upon the defendant by the Court as to Count II.

/s/ Marcus D. Shackleford
Foreman

Wauchula, Florida
September 30, 1975

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR HARDEE COUNTY, FLORIDA

SEPTEMBER TERM 19 75

CASE NO. 75-1[illegible]

STATE OF FLORIDA

vs

Earl Enmund
Defendant

JUDGMENT AND SENTENCE

The Defendant EARL ENMUND being personally before this Court, represented by MICHAEL TROMBLEY, his attorney of record, having been tried and found guilty of the crime of / entered a plea of guilty to the crime of / entered a plea of Nolo Contendere to the crime of COUNT I. FIRST DEGREE MURDER. COUNT II. FIRST DEGREE MURDER. COUNT III. ROBBERY and the Court having inquired and given the Defendant an opportunity to be heard and show cause why he should not be adjudged guilty and sentenced as provided by law, including an opportunity to offer matters in mitigation of sentence, and no cause being shown, it is thereupon:

Ordered that the Defendant EARL ENMUND is hereby adjudicated guilty of the crime of *. It is the sentence of the law that said Defendant be committed to the custody of the Department of Offender Rehabilitation of the State of Florida, to be imprisoned at hard labor for the term of *** in the institution in the State Correctional System to which said Department may cause you to be confined. (The Court recommends that you be confined at _____ type institution.)

It is further ordered that you shall be allowed 153 DAYS credit for such time as you have been incarcerated prior to the imposition of this sentence for this offense. (No credit should be allowed if the Defendant is already under sentence or if credit has been previously given for another offense. Strike if not applicable.)

It is further ordered that this sentence is (concurrent)(consecutive) with the sentence imposed for the crime of _____ in Case _____, _____ County, No. _____. (Strike if not applicable.)

It is further ordered that the Sheriff of HARDEE County, Florida, is hereby ordered and directed to deliver said Defendant to the Department of Offender Rehabilitation together with a copy of this Judgment and Sentence. It is further ordered and adjudged that said Defendant shall pay the sum of One Dollar ($1.00) pursuant to Section 943.24, Florida Statutes.

The Defendant in Open Court was advised of his right to appeal from this Judgment and Sentence within thirty days from this date, and the Defendant's entitlement to the assistance of counsel in taking said appeal upon a showing that said Defendant was entitled to an attorney at the expense of the State.

*FIRST DEGREE MURDER, ON BOTH OF THE TWO COUNTS, AND COUNT III, ROBBERY.

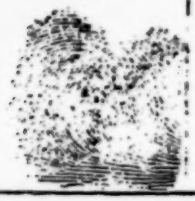
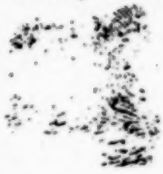
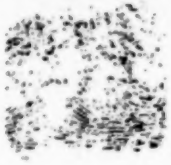
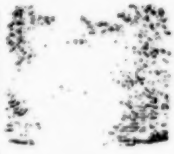
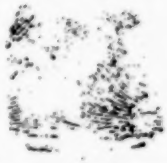
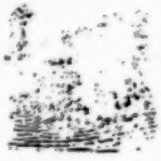
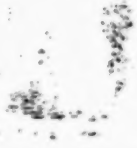
*** THE REST OF YOUR NATURAL LIFE, FOR COUNT III, TO RUN CONCURRENT WITH COUNTS I AND II.

FOR COUNTS I AND II, TO BE TRANSPORTED TO STATE PRISON TO BE PUT TO DEATH BY ELECTROCUTION.

25

The following are the fingerprints of the above-named Defendant, Earl Enmund:

(FINGERPRINTS)

1. Right Thumb	2. Right Index	3. Right Middle	4. Right Ring	5. Right Little
				
6. Left Thumb	**7. Left Index**	**8. Left Middle**	**9. Left Ring**	**10. Left Little**
				

DONE AND ORDERED IN Open Court at HARDEE County, Florida, this 30th day of SEPTEMBER A.D. 19 75. I HEREBY CERTIFY that the above and foregoing fingerprints on this Judgment and Sentence are the fingerprints of the Defendant, EARL ENMUND and that they were placed thereon by said Defendant in my presence in Open Court this date.

William A Norris
JUDGE

[R III]

[R 1699]

THE COURT: Earl Enmund, you have been found guilty by a jury of your peers and adjudged guilty of the offenses of two counts of murder in the first degree and one count of robbery. Can you or anyone in your behalf give to the Court any reason why sentence should not be imposed at this time?

Mr. Trombley?

MR. TROMBLEY: Your Honor, we can give no reason why sentence should not be imposed at this time.

THE COURT: Mr. Enmund, is there anything you wish to say in your behalf?

DEFENDANT EARL ENMUND: No.

THE COURT: Listen very carefully to me, Mr. Enmund, now.

You will have thirty days from today's date within which to appeal the judgment and sentence of the Court. You must do so by filing a notice of appeal in the office of the Clerk of the Circuit Court whose office is in this building. If you fail to do that, that will constitute a waiver, that is, you give up your right to appeal.

You have a right to have an attorney to represent you for the purpose of appeal. Should you not have the funds to hire an attorney, one will be appointed to represent you. Do you understand?

[R 1700]

DEFENDANT EARL ENMUND: I understand.

THE COURT: The Court in this case has the benefit of the recommendation from the Jury and the Court is mindful and is aware of all of the facts and circumstances, including the background of this Defendant based on the Court's participation in this trial and of the trial of one Jeanette Armstrong.

The Court finds in this case that the aggravating circumstances outweigh the mitigating circumstances. In

particular, and the Court will further set forth its reasons in a written judgment to be filed in the court files, that this capital felony was committed while the Defendant was engaged in or was an accomplice in the commission of or the attempt to commit or flight after committing or attempting to commit a robbery; the Court would further find this capital felony was committed for pecuniary gain and this capital felony was especially heinous, atrocious or cruel. The Court will further find as to this Defendant the record indicated in the sentencing procedure that he had previously been convicted of a felony involving the use of or threat of use of violence to a person. The Court can find no mitigating circumstances as it applies to this Defendant.

Therefore, as to Count Three of the Indictment, that is, the robbery charged, having adjudged the

[R 1701]

Defendant guilty. It will be the judgment of the Court and the sentence of the law that you serve the rest of your natural life in prison, that sentence, however, to run concurrent with the sentences to be imposed in Counts One and Two of the Indictment.

As to Counts One and Two of the Indictment, (Court rising to its feet) Earl Enmund, it will be the judgment of the Court and sentence of the law you be transported to the State Penitentiary, there to be held for a time and manner prescribed by law and thereafter to be put to death by electrocution. And may God have mercy on your soul. (Court resuming seat.)

Take Defendant Earl Enmund into custody.

* * * * *

[SR 11]

IN THE CIRCUIT COURT OF
HARDEE COUNTY, FLORIDA
CRIMINAL DIVISION

Hardee County Case No. 75-122

Supreme Court Case No. 48,525

STATE OF FLORIDA

vs.

EARL ENMUND

FINDINGS OF FACT—EARL ENMUND

The defendant was indicted by the Grand Jury of Hardee County, Florida, for two (2) counts of Murder in the First Degree and one (1) count of Robbery. Trial by jury was held and the defendant was found guilty of two (2) counts of Murder in the First Degree and one (1) count of Robbery. In a separate proceeding a majority of the trial jury recommended to the Court that the death penalty be imposed as to each count of Murder in the First Degree.

On September 30, 1975, the Court imposed the death penalty as to each count of Murder in the First Degree, however, the Court neglected to file written findings of fact as required by Section 921.141, Florida Statutes (1975). The Court did make certain findings in the sentencing dialogue. A transcript of the sentencing dialogue involving the defendant Enmund is attached hereto and incorporated herein by reference. Subsequently the Supreme Court of Florida remanded the case directing the undersigned to file written findings of fact as required by the Florida Statutes.

In accordance with the mandate of the Florida Supreme Court the Court makes the following findings of fact:

1. As an aggravated circumstance, the capital felony, that is, the murders of Thomas Henry Kersey, aged 86 years and his wife Eunice Maye Kersey, aged 74, were committed while the defendant Enmund was engaged, or was an accomplice, in the commission of, or

[SR 12]

an attempt to commit an armed robbery. FS 921.141 (5) (d)

2. As a further aggravating circumstance, the Court finds that the capital felony was committed for pecuniary gain. FS 921.141(5)(f). The evidence is abundantly clear that the armed robbery was committed for pecuniary gain and that the defendant Enmund was previously aware that Mr. Kersey had a reputation for keeping large sums of money on his person. The defendant Enmund actually saw Mr. Kersey with money, and the testimony amply indicates that the armed robbery of April 1, 1975, was planned ahead of time by the defendant Enmund.

3. As a further aggravating circumstance, the Court finds that the capital felony was especially heinous, atrocious, or cruel. FS 921.141(5)(h). The evidence amply supports a finding that the killing of Mr. Kersey aged 86, and Mrs. Kersey aged 74, was not a spontaneous matter. A reasonable person must conclude that the killings were done for no other purpose than to eliminate Mr. and Mrs. Kersey as witnesses to the armed robbery. The killings were premeditated in that Mr. Kersey was shot two (2) times and Mrs. Kersey was shot six (6) times. Two (2) bullets were subsequently recovered from the house, and one (1) in the water heater and one (1) in the doorjamb. The medical examiner testified that in his opinion the bodies had to have been shot while in a prone position (his alternative explanation was that someone could have stood on a roof and shot down, or else tied the Kerseys' by their feet, hoisted them up and shot them from below). The entry of the bullets indi-

cates that Mr. and Mrs. Kersey were in a prone position, that is, helpless to resist. The evidence indicates that Mrs. Kersey was shot first in the left side and that these wounds were not fatal, and that thereafter someone stood back and fired upon her prone body and then fired the bullets into the heater and the wall. Further, two (2) different weapons, that is, a .22 caliber

[SR 13]

weapon and a .38 caliber weapon were fired at and into Mr. and Mrs. Kersey.

Three individuals were charged with these crimes. The defendant Enmund and the defendant Sampson Armstrong were tried together and the defendant Jeanette Armstrong was tried separately. The Court knows from this trial and from the trial of Jeanette Armstrong that she was shot at the scene and sustained serious wounds. Since the defendant Jeanette Armstrong was seriously wounded and since both Mr. and Mrs. Kersey were each shot with bullets from two (2) different caliber guns, and since the evidence establishes that Mr. and Mrs. Kersey were each shot while in the prone position, it is only reasonable to conclude, and the Court so finds, that the defendant Enmund and the defendant Sampson Armstrong, each fired into the bodies of Mr. and Mrs. Kersey.

4. As a further aggravating circumstance, the Court finds that the defendant Enmund was previously convicted of a felony involving the use or threat of violence to the person. FS 921.141(5)(b). At the advisory hearing the State introduced a certified copy of a Judgment and Committment from the United States District Court, Southern District of Georgia, establishing that on April 10, 1957, the defendant Enmund was convicted of two (2) separate offenses of robbery by the use of violence.

5. The other aggravating circumstances to-wit: FS 921.141(5)(a); 921.141(5)(c); 921.141(5)(e); and, 921.141(5)(g), are inapplicable in this case.

As to mitigating circumstances involving the defendant Earl Enmund, the Court finds that *none* of the statutory mitigating circumstances applied to this defendant:

1. In particular, the Court has considered FS 921.141 (6) (a), and finds that the defendant has previously been convicted of the felony of robbery.

[SR 14]

2. As to FS 921.141 (6) (b), there is absolutely no evidence or suggestion that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

3. As to FS 921.141 (6) (c), there is absolutely no evidence that the victims were a participant in the defendant's conduct or consented to the act.

4. As to FS 921.141 (6) (d), the evidence clearly indicates that the defendant was an accomplice to the capital felony and that his participation in the capital felony was major. The defendant Enmund planned the capital felony and actively participated in an attempt to avoid detection by disposing of the murder weapons.

5. As to FS 921.141 (6) (e), there is absolutely no evidence that defendant acted under extreme duress or under the substantial domination of another person.

6. As to FS 921.141 (6) (f), there is absolutely no evidence that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

7. As to FS 921.141 (6) (g), the defendant was 42 years of age at the time of this offense.

Therefore, in consideration of the evidence presented at trial and at the sentencing hearing as to the defendant Earl Enmund, the Court finds that the aggravating circumstances of these capital felonies outweigh the mitigating circumstances, and upon consideration thereof, the Court was of the opinion at the time of sentencing and is now, some months later, that the sentence of death is justified and appropriate as to each Count of Murder in the First Degree.

[SR 15]

ENTERED in Bartow, Polk County, Florida, this 22nd day of April, 1977.

/s/ William A. Norris, Jr.
WILLIAM A. NORRIS, JR.
Circuit Judge

copies furnished to:

Robert E. Pyle, Esquire
Steven H. Denman, Esquire
George R. Georgieff, Esquire

SUPREME COURT OF FLORIDA

No. 48,525

EARL ENMUND, APPELLANT

vs.

STATE OF FLORIDA, APPELLEE

[April 16, 1981]

PER CURIAM.

This cause is before the Court on appeal from a judgment of conviction on two counts of murder in the first degree and one count of robbery. The Circuit Court of the Tenth Judicial Circuit, in and for Hardee County, sentenced appellant Earl Enmund to death, thus vesting in this Court jurisdiction of his appeal. Art. V, § 3(b)(1), Fla. Const.

The appellant and co-defendant Sampson Armstrong were tried together and convicted of the first-degree murders and robbery of Thomas and Eunice Kersey. After returning verdicts of guilt the trial jury heard evidence on the issue of sentence pursuant to section 921.141, Florida Statutes (1975), and recommended the death penalty for both defendants. The trial court imposed sentences of death on the appellant for the two counts of first-degree murder and a sentence of life imprisonment for the crime of robbery. We affirm the judgments of guilt of murder and robbery and the sentences of death.

I. Facts

On April 1, 1975, at about eight o'clock, a.m., the bodies of Thomas and Eunice Kersey were discovered by their daughter in their rural Hardee County home, located on state highway 62 between Fort Green to the west and Wauchula to the east. Mr. and Mrs. Kersey, aged eighty-six and seventy-four respectively, had been shot to death.

Some of the evidence constituting the state's case in the trial court consisted of physical items recovered at the scene and examined in the course of investigation. The bodies were found on the kitchen floor, near the back door of the home. There was a quantity of blood on the floor, some five feet away from where the bodies were lying, that prompted the authorities to investigate the possibility that one of the perpetrators was wounded during the attack. Later that morning, police found Jeanette Armstrong, the wife of co-defendant Sampson Armstrong, being treated for a gunshot wound in a hospital in nearby Avon Park, in Highlands County. The blood recovered at the scene proved to be of a different type from either of the Kerseys' blood, and to match the blood type of Jeanette Armstrong.

On the ground outside the house, investigators found a plastic jug filled with water.

There were four firearm projectiles found at the scene. One was on the ground outside the house, one in the door jamb of the back door, one in the water heater in the kitchen of the house, and one on the floor, under the body of Mrs. Kersey. Mrs. Kersey was shot six times in all, with three of the wounds being superficial so that three of the bullets exited the body. Three bullets remained in her body and were recovered. The three bullets found in the body all entered the body in the right side and passed downward.

Mr. Kersey was shot twice. One bullet entered his right arm and passed on through his heart to the left side of his body. The other entered his chest from di-

rectly in front. Both bullets were recovered. The bullet that entered from the right side had a slight downward angle. The one that entered the front of the chest was almost straight in its path from front to back. According to expert firearms identification testimony, one of the bullets recovered was a .38 caliber and the other was a .22 caliber. The .38 caliber bullet from the body of Mr. Kersey, a .38 caliber bullet from the body of Mrs. Kersey, and the .38 caliber bullet found in the kitchen door jamb, were all fired from the same weapon. The .22 caliber bullet found in the body of Mr. Kersey and a .22 caliber bullet from Mrs. Kersey were both fired from the same gun.

The pathologist who testified at trial told the court and the jury that when a bullet enters the body, it can be deflected in numerous ways, so that it is difficult to discern the angle of fire from the path of the bullet. With regard to the specific question of reconstructing the position of Mrs. Kersey when she was shot, based on the paths of the bullets, the pathologist testified, "Well, there are all sorts of possibilities. . . . There is really no way that I could determine what position her body was in when she was shot. . . . [S]he was shot from below, above, and behind." None of the entrance wounds on either of the bodies were inflicted from a range of closer than several feet away.

The state presented the testimony of a witness who drove by the Kersey home between 7:30 and 7:40 a.m. on the day the bodies were found. When she passed the Kersey home, she saw on the side of the road a large, cream-colored car with a license tag bearing the prefix number 18. There was a black man in the car. Another witness for the state drove by the house at 7:35 that morning and saw a car parked beside the road about two hundred yards west of the house. It was a large, yellow car with a dark colored top. There was one person in the car.

The state's evidence also included the testimony of two of the Kerseys' neighbors. One testified that on April 1st he was at work on his own land only two or three hundred yards from the Kerseys' house when, at about 7:45 a.m., he heard from six to fifteen shots of gun fire and some high-pitched screaming. The other neighbor said that he lived only two hundred yards west of the Kerseys, and that between 7:30 and 8:00 o'clock that morning he heard about seven loud sounds. He would have thought that they were caused by Mr. Kersey hammering to separate some scrap metal, except for their irregular sequence. From the sounds he remembered, he concluded that they also could have been gunfire.

A neighbor of the appellant also testified for the state. He said he lived about three-fourths of a mile from Enmund's home, and that they both lived on a road that runs off of New York Avenue south of the town of Wauchula. This witness testified that on the morning of April 1st, at about 6:30 he was standing out beside the road, New York Avenue, that goes into Wauchula to the north. He was waiting for a ride that was to take him to another town on personal business. The person who was to meet him there did not come that morning, but he was still standing there waiting for him after 8:00 o'clock. The witness said that at approximately 6:30 or 6:45, he saw Earl Enmund and his former common-law wife Ida Jean Shaw in their yellow Buick with a vinyl top. Ida Jean Shaw was driving. There were two others in the back seat, one male and one female. The car traveled north toward town (the town of Wauchula). At about 8:00 o'clock, the car came back, traveling "pretty fast" in a southerly direction on New York Avenue, with the appellant driving, Ida Jean Shaw in the front seat, and one of the other two people in the car lying down across the back seat.

The husband of the Kerseys' granddaughter testified that Mr. Kersey usually kept large amounts of cash on his person. He generally kept the cash in the form of

one-hundred-dollar bills. It was not unusual for him to have from ten to twenty of these on his person at any given time. He kept the money in his wallet, and the wallet was in his hip pocket at all times. He normally slept in his regular work clothing and kept the wallet in his pocket even as he slept.

Mr. Kersey, the witness testified, liked to show his cash to people he dealt with, and he did so frequently and indiscriminately. He tended to save his money rather than to spend it, and he was proudly vocal about having it. He was a large, strong man who felt that he could protect his wallet.

Another witness testified that two weeks prior to the murders, he saw that Mr. Kersey had from twelve to fifteen hundred dollars on his person.

A few weeks prior to the murders, the appellant and a friend jointly purchased a calf from Mr. Kersey. They paid him in cash and when Mr. Kersey took out his wallet to put away the money he showed them its contents. Appellant Enmund said, "Look at the money this man's got." Mr. Kersey responded, "That ain't no money. I can dig up $15,000, $16,000 any time I want to." Appellant's friend told Mr. Kersey that he shouldn't be showing his money around like that. Mr. Kersey said, "I know you, Jim." The other man responded, "Yeah, you know me but you don't know the rest of them." After the killings, Mr. Kersey's wallet was not found on his person or anywhere in the house.

J. B. Neal testified that at about noon on April 1, 1975, he saw co-defendant Sampson Armstrong in Lake Placid, in Highlands County. Armstrong told Neal that he and his wife Jeanette had done a robbery that morning at a ranch house outside of Wauchula and that Jeanette had been shot. Armstrong told the witness that they had gone to the back door of the house of an elderly man and woman, saying that they needed water for an overheated car. When Mr. Kersey came out of the house, Armstrong grabbed him, held his gun on him,

and told Jeanette to get the money out of his pocket. Then, the old man cried out to his wife, and through a window Armstrong saw Mrs. Kersey coming out the front door and around the house with a gun. Mrs. Kersey shot Jeanette Armstrong. Then Armstrong knocked the old man down and shot Mrs. Kersey. Mr. Kersey got back up and Armstrong shot him in the chest. After the shooting, they put the old people in the house, took the money and left.

Jeanette Armstrong is the daughter of Ida Jean Shaw. In April of 1975, Ida Jean Shaw and Earl Enmund were living together as husband and wife, and had been doing so for about twelve years.

There was testimony that the investigating authorities, based on witnesses' descriptions of the car seen near the Kersey home the morning of the murders, began to search for a large, yellow or cream-colored car with a dark top and having an "18" license tag prefix. They found a car meeting this general description in the possession of Ida Jean Shaw.

At Walker Memorial Hospital in Avon Park on the morning of the murders, police questioned Ida Jean Shaw concerning Jeanette Armstrong's gunshot wound. She told them that she and Jeanette had been traveling that morning from Wauchula to Avon Park when Jeanette entered an orange grove to urinate and was shot. In the subsequent course of the investigation of the Kersey murders, Ida Jean Shaw gave a statement to the state attorney implicating the appellant and Sampson Armstrong in the crimes. Subsequent to that initial statement, she gave two statements, one of them a formal deposition, in which she repudiated the original statement. In these statements she said that Jeanette Armstrong left her house on March 31, 1975 with two men referred to as Luke and Willie. According to this story, Jeanette said that they were going to Fort Myers to a nightclub. On the following morning, Luke and Willie brought Jeanette home wounded. Jeanette, Luke and

Willie then told Ms. Shaw to tell anyone who asked that Jeanette had been shot while trespassing in a citrus grove. The import of the story told in the depositions was to implicate "Luke and Willie" in the Kersey murders and to exculpate the defendants. In one of her depositions, Ida Jean Shaw stated that her earlier statement implicating the defendants in the crimes was false and was fabricated by agreement with Jeanette Armstrong and calculated to put Earl and Sampson in jail and thus be free of the strictures of married life.

Ida Jean Shaw, over the objections of the defendants, was called to testify at trial as a court's witness. The court examined her and then the state and counsel for each of the defendants cross-examined her.

Ms. Shaw testified at trial as follows. At and around the time of the crimes, she and the appellant lived together in a house on Revell Road in Wauchula, and that they had held themselves out to friends and neighbors and in business transactions as husband and wife for twelve years. Her daughter Jeanette was married to Sampson Armstrong and lived in Lake Placid. On the weekend preceding Tuesday, April 1st, Ms. Shaw celebrated a birthday. On Friday night, Jeanette came to her home. On Sunday, she and Jeanette went to Lake Placid and brought Sampson back. On Monday night, March 31, Jeanette, Sampson, and the appellant Enmund were all there at the house in Wauchula. On Tuesday, April 1st, when she awoke at about 7:45 a.m., none of the three was there. Neither was her brown and yellow 1969 Buick.

Ms. Shaw got up and went to the neighborhood wash house. About ten minutes later, either Enmund or Sampson Armstrong came into the wash house and told her that Jeanette had been shot. Ida Jean Shaw went back to the house. Jeanette was in the appellant's red Plymouth automobile. Sampson was with her and the appellant was in the house. Ms. Shaw then took Jeanette up to the local store corner and called an ambulance.

Then appellant Enmund came to the corner where they were awaiting the ambulance and asked her what had happened to Jeanette. Ida Jean Shaw told Enmund that Jeanette had been shot in an orange grove. Then the ambulance came and Ida Jean accompanied Jeanette on the ride to the hospital. Ida Jean learned from Jeanette how she was shot. Earl followed in a separate car. Sampson Armstrong also went to the hospital that day.

After spending Tuesday morning at the hospital, Ms. Shaw left there with Earl and Sampson. They went to Wauchula to get the children and then went on to Lake Placid. On the way to Wauchula, Ida Jean Shaw asked the appellant "why he did it." He replied that he had seen Mr. Kersey's money and therefore decided to rob him. Sampson Armstrong said that he made sure the people were dead.

Ida Jean Shaw testified further that on Wednesday, April 2, 1975, she, Earl, Sampson, and some of her children were in a car on their way home from the hospital when Sampson gave her $200. By passing written notes in the car, she asked him how much money he got out of the robbery and he responded that he had $600 left. She took the $200 and made a loan payment on an account of Earl Enmund's that was in arrears. There was corroborating testimony of this, and that the bill was paid with two one-hundred-dollar bills.

Ms. Shaw testified that prior to the events of April 1st, she kept a .22 caliber pistol in the glove compartment of her car. On April 2, she removed the gun from the loft at her house on Earl Enmund's directions. He and Sampson told her to get rid of the gun and also a .38 caliber pistol that was at the house, because, Sampson said, they had been used to kill some people. She put the guns in the bottom of a bucket of greens and gave the bucket to a friend, Jeanette's paternal uncle. This person testified that the bucket was a large and heavy metal one and that the greens spoiled in the trunk of his car. He said he threw them away, bucket and all, and didn't know about the guns. The murder weapons were never recovered.

At trial Ms. Shaw testified that the story about Luke and Willie was a complete fabrication, and that she made up the story and related it at the request of the defendants. Earl Enmund, she said, instructed her on this matter in letters smuggled out of the jail.

The state's counsel moved that Ida Jean Shaw be called as a court's witness on the ground that due to the inconsistencies in her pretrial statements, the state was not certain how she would testify and would not vouch for her credibility. Through her examination by the court, cross-examination by the state, and cross-examination by counsel for each of the defendants, the following matters pertaining to her credibility were brought out for consideration by the jury. Ms. Shaw was granted immunity from prosecution for any role she might have played in the murders and robbery. As related above, she gave several inconsistent statements during the investigation and prosecution of the crimes. One of her statements was in a deposition under oath, and at trial she conceded that she had lied in that statement. Prior to the trial, she was charged with perjury. She was arrested and held in jail for thirteen days. The prosecutors advised her of the maximum penalty for the crime of which she stood accused. Then they promised her that she would not be prosecuted for perjury if she would testify at the murder and robbery trial and tell the truth.

II. Issues on Appeal of the Judgment of Conviction

The appellant raises several points which he contends require the reversal of his convictions.

The appellant contends that the trial court erred in refusing to grant judgment of acquittal of the charge of robbery on the ground that there was insufficient evidence to support the verdict of guilt of that crime. We have carefully reviewed the record of the proceedings below and conclude that the judgment of conviction of the crime of robbery rests upon legally sufficient evidence.

The appellant argues that the trial court erred in denying his motion to exclude the testimony of Ida Jean Shaw.

He asserts that her inconsistent pretrial statements, which resulted in a charge of perjury, rendered her so unreliable as to be an incompetent witness. He also contends that the pendency of her perjury prosecution, which she was promised would be discontinued if she would testify truthfully, created an unacceptably high risk that her testimony would be the product of coercion.

With regard to the unreliability argument, the trial court informed the jury that Ms. Shaw was being called as a court's witness because the state could not vouch for her credibility. The jury was instructed to consider her testimony and to accord it whatever credibility they thought it deserved. It is within the discretion of the trial judge to call an uncooperative witness as a court's witness to allow the state to ask leading questions. *McCloud* v. *State*, 335 So.2d 257 (Fla. 1976).

With regard to the issue of coercion, the appellant cites *Davis* v. *State*, 334 So.2d 823 (Fla. 1st DCA 1976), *cert. denied*, 345 So.2d 427 (Fla. 1977), and *Lee* v. *State*, 324 So.2d 694 (Fla. 1st DCA 1976). The *Lee* case quoted this Court's statement in *Mathews* v. *State*, 44 So.2d 664 (Fla. 1950), that

> in interviews with witnesses before trial, the examiner "must exercise the utmost care and caution to extract and not to inject information, and by all means to resist the temptation to influence or bias the testimony of the witnesses."

Lee v. *State*, 324 So.2d at 698.

In *Davis*, the prosecuting attorney asked the trial court to delay the swearing of the jury because one of the witnesses he intended to call had become uncooperative. The witness, a close friend of the defendant, had made a statement in a deposition which linked the defendant to the crime but immediately before trial gave a different account of what she knew. The prosecutor conferred with her and told her that she had three choices: refuse to testify and be held in contempt of court and jailed; give an account that differed from her deposition statement

and be charged with perjury and possibly imprisoned for fifteen years; or testify to "the truth" in which event nothing would happen to her. The circumstances of the prosecutor's conference with the witness were revealed to the jury. On appeal, the district court reversed and remanded for a new trial, citing as authority *Lee* v. *State*. Applying the *Lee* principle to the facts before it, the court in *Davis* concluded:

> While it is true that the assistant state attorneys admonished the witness to tell the truth, it must have been obvious to the witness that the "truth" was that which she had testified to at an earlier deposition. Rules of evidence and procedure exist which are designed to assist prosecution and defense alike in eliciting the truth from balky witnesses. Coercion and threats are not among these rules.

Davis v. *State*, 334 So.2d at 826.

The appellant contends that when the prosecution told Ida Jean Shaw that she could be released from jail and have the perjury charges dropped if she would tell "the truth," there is an unacceptably high probability that she understood that the "truth" the prosecution wanted was testimony linking the appellant to the crimes. We disagree. In *Lee* v. *State*, the error was not in allowing the witness to testify but in keeping from the jury information regarding the arrangement by which the state gained the cooperation of the witness. In *Davis*, the prosecutor indicated to the witness that she should testify consistently with what she said before. Thus he "injected" information. In the case *sub judice*, the prosecution did not suggest to Ms. Shaw what they wanted her to say, but simply advised her to tell the truth. We hold that the court did not abuse its discretion in allowing into evidence the testimony of Ida Jean Shaw.

The appellant contends that a new trial is required because the jury was not fully informed of the understanding between the state and Ida Jean Shaw. It is

true, as appellant points out, that it is a denial of due process if the jury is misled as to facts bearing on the credibility of a witness. *Napue* v. *Illinois*, 360 U.S. 264 (1959). If a failure to fully inform the jury of the interest of a witness could in any reasonable likelihood have affected the decision of the jury, a new trial is required. *Giglio* v. *United States*, 405 U.S. 150 (1972); *Wolfe* v. *State*, 190 So.2d 394 (Fla. 1st DCA 1966). Our review of the record reveals that the jury in the present case was fully informed of Ms. Shaw's immunity transaction and her pending perjury prosecution.

The appellant contends that there is no evidence that he committed premeditated murder on either of the victims, or that he was present aiding and abetting the robbery when they were shot. He argues that the very most the jury could have concluded from the evidence is that he was in the car seen out by the highway when the robbery and murders were committed. Therefore, he contends, the most serious crime of which he could be convicted with regard to each of the homicides is murder in the second degree, based on the felony murder rule.

In support of this contention appellant cites the distinction drawn by this Court in *State* v. *Dixon*, 283 So.2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974), between first-degree felony murder and second-degree felony murder. At the time of the crimes, the degrees of homicide were defined by section 782.04, Florida Statutes (1973). The definitions of murder given in that statute had been revised by chapter 72-724, Laws of Florida, and those revisions were construed in *Dixon*. The Court said that the new statute established "two separate and easily distinguishable degrees of crime, depending upon the presence of the defendant as a principal in the first or second degree." *State* v. *Dixon*, 283 So.2d at 11. Section 782.04 as amended by chapter 72-724 evinced a legislative intent "to resurrect the distinction between principals in the first or second degree on the one hand and accessories before the fact on the other, in determining whether a

party to a violent felony resulting in murder is chargeable with murder in the first degree or murder in the second degree." *Id.* at 11. The distinction had previously been laid to rest for all purposes by chapter 57-310, Laws of Florida. *See* § 776.011, Fla. Stat. (1973).

In a later case, the Court explained that the *Dixon* construction had provided a limited scope to the second-degree felony murder provision, and held that under the murder statute as amended by chapter 72-724,

> an individual who personally kills another during the perpetration or attempt to perpetrate one of the enumerated felonies is guilty of first degree murder. In such circumstances, the statutory scheme does not allow for a conviction of second degree murder. Moreover, the felon's liability for first degree murder extends to all of his co-felons who are personally present. As perpetrators of the underlying felony, they are principals in the homicide. In Florida, as in the majority of jurisdictions, the felony murder rule and the law of principals combine to make a felon generally responsible for the lethal acts of his co-felon. Only if the felon is an accessory before the fact and not personally present does liability attach under the second degree murder provision of the applicable statute in the instant case.

Adams v. *State*, 341 So.2d 765, 768-69 (Fla. 1976), *cert. denied*, 434 U.S. 878 (1977) (footnote omitted). We conclude, therefore, that if the appellant's conduct that the jury could have found from the evidence made him an accessory before the fact to the underlying felony of robbery, then his contention that the highest offense for which he may be convicted is second-degree murder must be accepted. If, on the other hand, the jury could have concluded from the evidence that the appellant was a principal of the first or second degree in the crime of robbery, then his contention is without merit and we must hold that the evidence was sufficient for a verdict

of guilty of murder in the first degree. To determine the issue as thus framed, it is necessary, as Dixon suggested, to "refer to the rich heritage of case law on the distinctions between principals in the first or second degree and accessories before the fact." *State* v. *Dixon*, 283 So.2d at 11.

All persons participating in a crime are principals of the first or second degree. The actual perpetrator is a principal of the first degree. A person who does not commit the crime with his own hands but is present, aiding and abetting the actual perpetrator, is a principal of the second degree. They are both equally guilty of the crime being committed. *Lake* v. *State*, 100 Fla. 373, 129 So. 827 (1930). "An accessory before the fact is one who, though absent at the time of the commission of an offense, does nevertheless procure, counsel, command, or abet another to commit such offense." *Kauz* v. *State*, 98 Fla. 687, 124 So. 177, 178 (1929). *See generally Henderson* v. *State*, 70 So.2d 358 (Fla. 1954); *Albritton* v. *State*, 32 Fla. 358, 13 So. 955 (1893).

The legislature did away with these distinctions when it enacted section 776.011, Florida Statutes (1973). Ch. 57-310, § 1, Laws of Fla. Section 776.011 provided:

> 776.011 Principal in first degree.—Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, is a principal in the first degree and may be charged, convicted and punished as such, whether he is or is not actually or constructively present at the commission of such offense.

However, when the legislature amended the law of murder in 1972, ch. 72-724, Laws of Fla., it revived a distinction, according to this Court's construction in *Dixon* and *Adams*, between principals of the first and second degree on the one hand and accessories before the fact on the other, for purposes of distinguishing first and

second degree felony murder. This is why the pre-existing case law on that distinction is still relevant. The law of murder as amended by chapter 72-724 was in force at the time of the crimes at issue herein. It provided:

> 782.04 Murder.—
>
> (1) (a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen years when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in § 775.082.
>
> (b) In all cases under this section, the procedure set forth in § 921.141 shall be followed in order to determine sentence of death or life imprisonment.
>
> (2) When perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, or when committed in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, except as provided in subsection (1), it shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment in the state prison for life or for such term of years as may be determined by the court.

> (3) When perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, it shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

§ 782.04, Fla. Stat. (1973).

In a prosecution for murder in the first degree, if the accused was present aiding and abetting the commission or attempt of one of the violent felonies listed in the first-degree murder statute, he is equally guilty, with the actual perpetrator of the underlying felony, of first-degree murder. *E.g. Pope* v. *State*, 84 Fla. 428, 94 So. 865 (1922). Furthermore,

> the presence of the aider and abetter need not have been actual, but it is sufficient if he was constructively present, provided the aider, pursuant to a previous understanding, is sufficiently near and so situated as to abet or encourage, or to render assistance to, the actual perpetrator in committing the felonious act or in escaping after its commission.

Id. at 446, 94 So. at 871.

There was no direct evidence at trial that Earl Enmund was present at the back door of the Kersey home when the plan to rob the elderly couple led to their being murdered. J. B. Neal's account of what Sampson Armstrong told him did not include any reference to Enmund. Ida Jean Shaw testified to Enmund's absence that morning and his statements of his complicity. But the only evidence of the degree of his participation is the jury's likely inference that he was the person in the car by the side of the road near the scene of the crimes. The jury could have concluded that he was there, a few hundred

feet away, waiting to help the robbers escape with the Kerseys' money. The evidence, therefore, was sufficient to find that the appellant was a principal of the second degree, constructively present aiding and abetting the commission of the crime of robbery. This conclusion supports the verdicts of murder in the first degree on the basis of the felony murder portion of section 782.04(1)(a).

The judgment of conviction of two counts of first-degree murder and one count of robbery is therefore affirmed.

III. Sentence

We come now to the consideration of the sentences of death imposed on the appellant pursuant to section 921.141, Florida Statutes (Supp. 1974). The appellant has presented a number of arguments in his brief, only a few of which we find merit consideration.

Appellant contends that section 921.141 improperly restricts the jury and judge to the consideration of the mitigating circumstances enumerated in the statute. Thus, he argues, the statute violates the eighth and fourteenth amendments under *Lockett* v. *Ohio*, 438 U.S. 586 (1978). We have held that our statute, as it has been construed and applied, does not restrict the jury's consideration and differs from the statute considered in *Lockett*. *Songer* v. *State*, 365 So.2d 696, 700 (1978) (on rehearing), *cert. denied*, 441 U.S. 956 (1979). *See generally Proffitt* v. *Florida*, 428 U.S. 242 (1976); *State* v. *Dixon*, 283 So.2d 1 (Fla. 1973).

Appellant contends that the trial judge's factual findings on which he based the decision to impose death were derived in part from information not disclosed to the appellant and which he therefore had no opportunity to rebut, explain, or deny. A death sentence based on such nondisclosed information would violate the rule of *Gardner* v. *Florida*, 430 U.S. 349 (1977). During the pendency of this appeal, we directed the judge who imposed the sentences in this case to state whether he did so based

on any such nondisclosed information. We are satisfied from his response that there was no due process violation under *Gardner*.

The appellant advises us that Jeanette Armstrong, originally a co-defendant with him, was tried separately, convicted of two counts of second-degree murder and one count of robbery, and sentenced to three consecutive life sentences. He argues that his death sentences must be vacated because the jury was not advised of the ultimate disposition of the charges against Jeanette Armstrong.

In *Messer* v. *State*, 330 So.2d 137 (Fla. 1976), we vacated the sentence of death, partly on the ground that the court erred in refusing to permit the defendant to submit to the jury evidence of the plea-bargained conviction and sentence of the appellant's accomplice. Any evidence reasonably related to a valid mitigating consideration should, when proffered by the defendant, be admitted into evidence at the sentencing phase of a capital felony trial. *See, e.g., Miller* v. *State*, 332 So.2d 65 (Fla. 1976). Appellant did not proffer the evidence in question. Therefore, even assuming the information had some valid mitigating value, we can find no trial court error under the *Messer* rule.

Appellant contends that since the evidence does not establish that he intended to take life, the death penalty is impermissible under the eighth amendment ban on cruel and unusual punishment. Appellant offers us no binding legal authority that directly supports this proposition, and we therefore reject it.

After the sentencing hearing was held and sentencing arguments presented to the jury, the jury recommended a sentence of death. The trial judge sentenced appellant to death and subsequently put his findings and considerations in writing as follows:

> In accordance with the mandate of the Florida Supreme Court the Court makes the following findings of fact:

1. As an aggravated circumstance, the capital felony, that is, the murders of Thomas Henry Kersey, aged 86 years and his wife Eunice Maye Kersey, aged 74, were committed while the defendant Enmund was engaged, or was an accomplice, in the commission of or an attempt to commit an armed robbery. FS 921.141(5)(d).

2. As a further aggravating circumstance, the Court finds that the capital felony was committed for pecuniary gain. FS 921.141(5)(f). The evidence is abundantly clear that the armed robbery was committed for pecuniary gain and that the defendant Enmund was previously aware that Mr. Kersey had a reputation for keeping large sums of money on his person. The defendant Enmund actually saw Mr. Kersey with money, and the testimony amply indicates that the armed robbery of April 1, 1975, was planned ahead of time by the defendant Enmund.

3. As a further aggravating circumstance, the Court finds that the capital felony was especially heinous, atrocious, or cruel. FS 921.141(5)(h). The evidence amply supports a finding that the killing of Mr. Kersey aged 86, and Mrs. Kersey aged 74, was not a spontaneous matter. A reasonable person must conclude that the killings were done for no other purpose than to eliminate Mr. and Mrs. Kersey as witnesses to the armed robbery. The killings were premeditated in that Mr. Kersey was shot two (2) times and Mrs. Kersey was shot six (6) times. Two (2) bullets were subsequently recovered from the house, one (1) in the water heater and one (1) in the doorjamb. The medical examiner testified that in his opinion the bodies had to have been shot while in a prone position (his alternative explanation was that someone could have stood on a roof and shot down, or else tied the Kerseys' by their feet, hoisted them up and shot them from below). The entry of the bullets indicates that Mr. and Mrs. Kersey were

in a prone position, that is, helpless to resist. The evidence indicates that Mrs. Kersey was shot first in the left side and that these wounds were not fatal, and that thereafter someone stood back and fired upon her prone body and then fired the bullets into the heater and the wall. Further, two (2) different weapons, that is, a .22 caliber weapon and a .38 weapon were fired at and into Mr. and Mrs. Kersey.

Three individuals were charged with these crimes. The defendant Enmund and the defendant Sampson Armstrong were tried together and the defendant Jeanette Armstrong was tried separately. The Court knows from this trial and from the trial of Jeanette Armstrong that she was shot at the scene and sustained serious wounds. Since the defendant Jeanette Armstrong was seriously wounded and since both Mr. and Mrs. Kersey were each shot with bullets from two (2) different caliber guns, and since the evidence establishes that Mr. and Mrs. Kersey were each shot while in the prone position, it is only reasonable to conclude, and the Court so finds, that the defendant Enmund and the defendant Sampson Armstrong, each fired into the bodies of Mr. and Mrs. Kersey.

4. As a further aggravating circumstance, the Court finds that the defendant Enmund was previously convicted of a felony involving the use or threat of violence to the person. FS 921.141(5)(b). At the advisory hearing the State introduced a certified copy of a Judgment and Committment [sic] from the United States District Court, Southern District of Georgia, establishing that on April 10, 1957, the defendant Enmund was convicted of two (2) separate offenses of robbery by the use of violence.

5. The other aggravating circumstances to-wit: FS 921.141(5)(a); 921.141(5)(c); 921.141(5)(e); and, 921.141(5)(g), are inapplicable in this case.

As to mitigating circumstances involving the defendant Earl Enmund, the Court finds that *none* of the statutory mitigating circumstances applied to this defendant:

1. In particular, the Court has considered FS 921.141(6)(a), and finds that the defendant has previously been convicted of the felony of robbery.

2. As to FS 921.141(6)(b), there is absolutely no evidence or suggestion that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

3. As to FS 921.141(6)(c), there is absolutely no evidence that the victims were a participant in the defendant's conduct or consented to the act.

4. As to FS 921.141(6)(d), the evidence clearly indicates that the defendant was an accomplice to the capital felony and that his participation in the capital felony was major. The defendant Enmund planned the capital felony and actively participated in an attempt to avoid detection by disposing of the murder weapons.

5. As to FS 921.141(6)(e), there is absolutely no evidence that defendant acted under extreme duress or under the substantial domination of another person.

6. As to FS 921.141(6)(f), there is absolutely no evidence that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

7. As to FS 921.141(6)(g), the defendant was 42 years of age at the time of this offense.

Therefore, in consideration of the evidence presented at trial and at the sentencing hearing as to the defendant Earl Enmund, the Court finds that the aggravating circumstances of these capital felonies outweigh the mitigating circumstances, and upon consideration thereof, the Court was of the

> opinion at the time of sentencing and is now, some months later, that the sentence of death is justified and appropriate as to each Count of Murder in the First Degree.

The judge's findings that the capital felonies were committed in the course of robbery and that the capital felonies were committed for pecuniary gain both "refer to the *same aspect* of the defendant's crime." *Provence* v. *State*, 337 So.2d 783, 786 (Fla. 1976), *cert. denied*, 431 U.S. 969 (1977). The robbery circumstance and the pecuniary motive constitute "only one factor which we must consider in this case." *Id.* at 786. Where such double consideration of one factor appears to have impaired the process of weighing the aggravating circumstances against the mitigating circumstances, the sentence of death must be vacated. *See Elledge* v. *State*, 346 So.2d 998 (Fla. 1977). The "mere recitation of both circumstances does not in all cases call for a condemnation of the sentencing hearing and judgment." *Hargrave* v. *State*, 366 So.2d 1, 5 (Fla. 1978), *cert. denied*, 444 U.S. 919 (1979). Here, even absent the consideration of either of the factors of robbery and pecuniary gain, there remains one valid statutory aggravating circumstance to consider. There are no mitigating circumstances. The fact that the murders took place in the course of a robbery and that the criminal episode was motivated by pecuniary gain will therefore simply be treated as one factor.

The recited circumstance, that the murders were especially heinous, atrocious, and cruel, cannot be approved. *Armstrong* v. *State*, Case No. 48,516, (opinion filed March 26, 1981). However, there are two aggravating circumstances (robbery-pecuniary gain and previous conviction of a violent felony) and no mitigating circumstances. The jury recommended death. The finding that no mitigating circumstances were present was not error. Therefore, the sentence of death is appropriate and we approve it.

The judgment and sentences are affirmed.

It is so ordered.

SUNDBERG, C.J., ADKINS, BOYD and ENGLAND, JJ., Concur

OVERTON, J., Concurs in part and dissents in part with an opinion

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

OVERTON, J., concurring in part, dissenting in part.

I concur in affirming the conviction. I dissent in the sentence and would remand for resentencing in view of the specific finding of the majority that the appellant did not actually participate in the shooting. In his sentencing order the trial judge found to the contrary, expressing the view in his findings of aggravating circumstances that the appellant was present and assisted in the commission of the murder. In my opinion, these contrary findings require a resentencing proceeding.

An Appeal from the Circuit Court in and for Hardee County, William A. Norris, Jr., Judge—Nos. 75-122 and 75-123

Jack O. Johnson, Public Defender; Steven H. Denman, W.C. McLain, and David A. Davis, Assistant Public Defenders, Bartow, Florida, for Appellant

Jim Smith, Attorney General, Donald K. Rudser and Charles A. Stampelos, Assistant Attorney Generals, Tallahassee, Florida, for Appellee

SUPREME COURT OF THE UNITED STATES

No. 81-5321

EARL ENMUND, PETITIONER

v.

FLORIDA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

ON CONSIDERATION of the motion for leave to proceed *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

October 19, 1981

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QUESTION PRESENTED

WHETHER A DEATH SENTENCE IMPOSED UPON A DEFENDANT CONVICTED OF FIRST DEGREE MURDER IS DISPROPORTIONATE TO THE CRIME IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHEN THE DEFENDANT'S PARTICIPATION IN THE CAPITAL FELONY WAS MAJOR, TO-WIT: THE DEFENDANT PLANNED THE CAPITAL FELONY, WAS PRESENT WITHIN A FEW HUNDRED FEET OF THE MURDERS, DROVE THE GETAWAY VEHICLE, AND PARTICIPATED IN AN ATTEMPT TO AVOID DETECTION BY DISPOSING OF THE MURDER WEAPONS?

PARTIES

In the Supreme Court of Florida, Petitioner was the appellant and the State of Florida was the appellee.

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CITATATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Florida upon which review is sought is reported as Enmund v. State, 399 So.2d 1362 (Fla. 1981). Rehearing was denied on July 20, 1981.

STATEMENT OF THE CASE

Respondent does not accept Petitioner's Statement of the Case and instead asserts the statement of the case as set forth by the Supreme Court of Florida in its opinion in Enmund v. State, 399 So.2d 1362 (Fla. 1981):

> This cause is before the Court on appeal from a judgment of conviction on two counts of murder in the first degree and one count of robbery. The Circuit Court of the Tenth Judicial Circuit, in and for Hardee County, sentenced appellant Earl Enmund to death, thus vesting in this Court jurisdiction of his appeal. Art. V, § 3(b)(1), Fla.Const.
>
> The appellant and co-defendant Sampson Armstrong were tried together and convicted of the first-degree murders and robbery of Thomas and Eunice Kersey. After returning verdicts of guilt the trial jury heard evidence on the issue of sentence pursuant to section 921.141, Florida Statutes (1975), and recommended the death penalty for both defendants: The trial court imposed sentences of death on the appellant for the two counts of first degree murder and a sentence of life imprisonment for the crime of robbery. We affirm the judgments of guilt of murder and robbery and the sentences of death.

Id. at 1363.

STATEMENT OF FACTS

Respondent does not accept Petitioner's Statement of Facts as set forth in Petitioner's Statement of the Case and instead tenders the following facts as set forth by the Supreme Court of Florida in its opinion:

> On April 1, 1975, at about eight o'clock, a.m., the bodies of Thomas and Eunice Kersey were discovered by their daughter in their rural Hardee County home, located on state highway 62 between Fort Green to the west and Wauchula to the east. Mr. and Mrs. Kersey, aged eighty-six and seventy-four respectively, had been shot to death.
>
> Some of the evidence constituting the state's case in the trial court consisted of physical items recovered at the scene and examined in the course of investigation. The bodies were found on the kitchen floor, near the back door of the home. There was a quantity of blood on the floor, some five feet away from where the bodies were lying, that prompted the authorities to investigate the possibility that one of the perpetrators was wounded during the attack. Later that morning, police found Jeanette Armstrong, the wife of co-defendant Sampson Armstrong, being treated for a gunshot wound in a hospital in nearby Avon Park, in Highlands County. The blood recovered at the scene proved to be of a different type from either of the Kerseys' blood, and to match the blood type of Jeanette Armstrong.
>
> On the ground outside the house, investigators found a plastic jug filled with water.
>
> There were four firearm projectiles found at the scene. One was on the ground outside the house, one in the door jamb of the back door, one in the water heater in the kitchen of the house, and one on the floor, under the body of Mrs. Kersey. Mrs. Kersey was shot six times in all, with three of the wounds being superficial so that three of the bullets exited the body. Three bullets remained in her body and were recovered. The three bullets found in the body all entered the body in the right side and passed downward.
>
> Mr. Kersey was shot twice. One bullet entered his right arm and

passed on through his heart to the left side of his body. The other entered his chest from directly in front. Both bullets were recovered. The bullet that entered from the right side had a slight downward angle. The one that entered the front of the chest was almost straight in its path from front to back. According to expert firearms identification testimony, one of the bullets recovered was a .38 caliber and the other was a .22 caliber. The .38 caliber bullet from the body of Mr. Kersey, a .38 caliber bullet from the body of Mrs. Kersey, and the .38 caliber bullet found in the kitchen door jamb, where [sic] all fired from the same weapon. The .22 caliber bullet found in the body of Mr. Kersey and a .22 caliber bullet from Mrs. Kersey were both fired from the same gun.

The pathologist who testified at trial told the court and the jury that when a bullet enters the body, it can be deflected in numerous ways, so that it is difficult to discern the angle of fire from the path of the bullet. With regard to the specific question of reconstructing the position of Mrs. Kersey when she was shot, based on the paths of the bullets, the pathologist testified, "Well, there are all sorts of possibilities. . . . There is really no way that I could determine what position her body was in when she was shot. . . . [S]he was shot from below, above, and behind." None of the entrance wounds on either of the bodies were inflicted from a range of closer than several feet away.

The state presented the testimony of a witness who drove by the Kersey home between 7:30 and 7:40 a.m. on the day the bodies were found. When she passed the Kersey home, she saw on the side of the road a large, cream-colored car with a license tag bearing the prefix number 18. There was a black man in the car. Another witness for the state drove by the house at 7:35 that morning and saw a car parked beside the road about two hundred yards west of the house. It was a large, yellow car with a dark colored top. There was one person in the car.

The state's evidence also included the testimony of two of the Kerseys' neighbors. One testified that on April 1st he was at work on his own land only two or three hundred yards from the

Kerseys' house when, at about 7:45 a.m., he heard from six to fifteen shots of gun fire and some highpitched screaming. The other neighbor said that he lived only two hundred yards west of the Kerseys, and that between 7:30 and 8:00 o'clock that morning he heard about seven loud sounds. He would have thought that they were caused by Mr. Kersey hammering to separate some scrap metal, except for their irregular sequence. From the sounds he remembered, he concluded that they also could have been gunfire.

A neighbor of the appellant also testified for the state. He said he lived about three-fourths of a mile from Enmund's home, and that they both lived on a road that runs off of New York Avenue south of the town of Wauchula. This witness testified that on the morning of April 1st, at about 6:30 he was standing out beside the road, New York Avenue, that goes into Wauchula to the north. He was waiting for a ride that was to take him to another town on personal business. The person who was to meet him there did not come that morning, but he was still standing there waiting for him after 8:00 o'clock. The witness said that at approximately 6:30 or 6:45, he saw Earl Enmund and his former common-law wife Ida Jean Shaw in their yellow Buick with a vinyl top. Ida Jean Shaw was driving. There were two others in the back seat, one male and one female. The car traveled north toward town (the town of Wauchula). At about 8:00 o'clock, the car came back, travelling "pretty fast" in a southerly direction on New York Avenue, with the appellant driving, Ida Jean Shaw in the front seat, and one of the other two people in the car lying down across the back seat.

The husband of the Kerseys' granddaughter testified that Mr. Kersey usually kept large amounts of cash on his person. He generally kept the cash in the form of one-hundred-dollar bills. It was not unusual for him to have from ten to twenty of these on his person at any given time. He kept the money in his wallet, and the wallet was in his hip pocket at all times. He normally slept in his regular work clothing and kept the wallet in his pocket even as he slept.

Mr. Kersey, the witness testified, liked to show his cash to people he dealt with, and he did so frequently

and indiscriminately. He tended to save his money rather than to spend it, and he was proudly vocal about having it. He was a large, strong man who felt that he could protect his wallet.

Another witness testified that two weeks prior to the murders, he saw that Mr. Kersey had from twelve to fifteen hundred dollars on his person.

A few weeks prior to the murders, the appellant and a friend jointly purchased a calf from Mr. Kersey. They paid him in cash and when Mr. Kersey took out his wallet to put away the money he showed them its contents. Appellant Enmund said, "Look at the money this man's got." Mr. Kersey responded, "That ain't no money. I can dig up $15,000, $16,000 any time I want to." Appellant's friend told Mr. Kersey that he shouldn't be showing his money around like that. Mr. Kersey said, "I know you, Jim." The other man responded, "Yeah, you know me but you don't know the rest of them." After the killings, Mr. Kersey's wallet was not found on his person or anywhere in the house.

J. B. Neal testified that at about noon on April 1, 1975, he saw co-defendant-Sampson Armstrong in Lake Placid, in Highlands County. Armstrong told Neal that he and his wife Jeanette had done a robbery that morning at a ranch house outside of Wauchula and that Jeanette had been shot. Armstrong told the witness that they had gone to the back door of the house of an elderly man and woman, saying that they needed water for an overheated car. When Mr. Kersey came out of the house, Armstrong grabbed him, held his gun on him, and told Jeanette to get the money out of his pocket. Then, the old man cried out to his wife, and through a window Armstrong saw Mrs. Kersey coming out the front door and around the house with a gun. Mrs. Kersey shot Jeanette Armstrong. Then Armstrong knocked the old man down and shot Mrs. Kersey. Mr. Kersey got back up and Armstrong shot him in the chest. After the shooting, they put the old people in the house, took the money and left.

Jeanette Armstrong is the daughter of Ida Jean Shaw. In April of 1975, Ida Jean Shaw and Earl Enmund were living together as husband and wife,

and had been doing so for about twelve years.

There was testimony that the investigating authorities, based on witnesses' descriptions of the car seen near the Kersey home the morning of the murders, began to search for a large, yellow or cream-colored car with a dark top and having an "18" license tag prefix. They found a car meeting this general description in the possession of Ida Jean Shaw.

At Walker Memorial Hospital in Avon Park on the morning of the murders, police questioned Ida Jean Shaw concerning Jeanette Armstrong's gunshot wound. She told them that she and Jeanette had been travelling that morning from Wauchula to Avon Park when Jeanette entered an orange grove to urinate and was shot. In the subsequent course of the investigation of the Kersey murders, Ida Jean Shaw gave a statement to the state attorney implicating the appellant and Sampson Armstrong in the crimes. Subsequent to that initial statement, she gave two statements, one of them a formal deposition, in which she repudiated the original statement. In these statements she said that Jeanette Armstrong left her house on March 31, 1975 with two men referred to as Luke and Willie. According to this story, Jeanette said that they were going to Fort Myers to a nightclub. On the following morning, Luke and Willie brought Jeanette home wounded. Jeanette, Luke and Willie then told Ms. Shaw to tell anyone who asked that Jeanette had been shot while trespassing in a citrus grove. The import of the story told in the depositions was to implicate "Luke and Willie" in the Kersey murders and to exculpate the defendants. In one of her depositions, Ida Jean Shaw stated that her earlier statement implicating the defendants in the crimes was false and was fabricated by agreement with Jeanette Armstrong and calculated to put Earl and Sampson in jail and thus be free of the strictures of married life.

Ida Jean Shaw, over the objection of the defendants, was called to testify at trial as a court's witness. The court examined her and then the state and counsel for each of the defendants cross-examined her.

Ms. Shaw testified at trial as follows. At and around the time of

the crimes, she and the appellant lived together in a house on Revell Road in Wauchula, and that they had held themselves out to friends and neighbors and in business transactions as husband and wife for twelve years. Her daughter Jeanette was married to Sampson Armstrong and lived in Lake Placid. On the weekend preceding Tuesday, April 1st, Ms. Shaw celebrated a birthday. On Friday night, Jeanette came to her home. On Sunday, she and Jeanette went to Lake Placid and brought Sampson back. On Monday night, March 31, Jeanette, Sampson, and the appellant Enmund were all there at the house in Wauchula. On Tuesday, April 1st, when she awoke at about 7:45 a.m., none of the three was there. Neither was her brown and yellow 1969 Buick.

Ms. Shaw got up and went to the neighborhood wash house. About ten minutes later, either Enmund or Sampson Armstrong came into the wash house and told her that Jeanette had been shot. Ida Jean Shaw went back to the house. Jeanette was in the appellant's red Plymouth automobile. Sampson was with her and the appellant was in the house. Ms. Shaw then took Jeanette up to the local store corner and called an ambulance. Then appellant Enmund came to the corner where they were awaiting the ambulance and asked her what had happened to Jeanette. Ida Jean Shaw told Enmund that Jeanette had been shot in an orange grove. Then the ambulance came and Ida Jean accompanied Jeanette on the ride to the hospital. Ida Jean learned from Jeanette how she was shot. Earl followed in a separate car. Sampson Armstrong also went to the hospital that day.

After spending Tuesday morning at the hospital, Ms. Shaw left there with Earl and Sampson. They went to Wauchula to get the children and then went on to Lake Placid. On the way to Wauchula, Ida Jean Shaw asked the appellant "why he did it." He replied that he had seen Mr. Kersey's money and therefore decided to rob him. Sampson Armstrong said that he made sure the people were dead.

Ida Jean Shaw testified further that on Wednesday, April 2, 1975, she, Earl, Sampson, and some of her children were in a car on their way home from the hospital when Sampson gave her $200. By passing written notes in the car, she

asked him how much money he got out of the robbery and he responded that he had $600 left. She took the $200 and made a loan payment on an account of Earl Enmund's that was in arrears. There was corroborating testimony of this, and that the bill was paid with two one-hundred-dollar bills.

Ms. Shaw testified that prior to the events of April 1st, she kept a .22 caliber pistol in the glove compartment of her car. On April 2, she removed the gun from the loft at her house on Earl Enmund's directions. He and Sampson told her to get rid of the gun and also a .38 caliber pistol that was at the house, because, Sampson said, they had been used to kill some people. She put the guns in the bottom of a bucket of greens and gave the bucket to a friend, Jeanette's paternal uncle. This person testified that the bucket was a large and heavy metal one and that the greens spoiled in the trunk of his car. He said he threw them away, bucket and all, and didn t know about the guns. The murder weapons were never recovered.

At trial Ms. Shaw testified that the story about Luke and Willie was a complete fabrication, and that she made up the story and related it at the request of the defendants. Earl Enmund, she said, instructed her on this matter in letters smuggled out of the jail.

The state's counsel moved that Ida Jean Shaw be called as a court's witness on the ground that due to the inconsistencies in her pretrial statements, the state was not certain how she would testify and would not vouch for her credibility. Through her examination by the court, cross-examination by the state, and cross-examination by counsel for each of the defendants, the following matters pertaining to her credibility were brought out for consideration by the jury. Ms. Shaw was granted immunity from prosecution for any role she might have played in the murders and robbery. As related above, she gave several inconsistent statements during the investigation and prosecution of the crimes. One of her statements was in a deposition under oath, and at trial she conceded that she had lied in that statement. Prior to the trial, she was charged with perjury. She was arrested and held in jail for thirteen days. The prosecutors advised

her of the maximum penalty for the crime of which she stood accused. Then they promised her that she would not be prosecuted for perjury if she would testify at the murder and robbery trial and tell the truth.

399 So.2d at 1363-1367.

JURISDICTION

The jurisdiction of this Court is asserted under 28 U.S.C. § 1257(3).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The sole issue raised by Petitioner is that his death sentences are allegedly disproportionate to the crimes of murder for which he was convicted. Petitioner's argument is predicated on his allegation that he did not intend that the victims be killed and that he was not physically present at the exact scene of the murders. However, the State of Florida strongly asserts that the penalty for a first degree murder conviction is a matter of state law and that Petitioner has not presented a substantial federal question.

In Gregg v. Georgia, 428 U.S. 153, 187 (1976), this Court held that a sentence of death could be imposed for a particular offense if the procedure followed in reaching the decision to impose the death penalty was not constitutionally infirm and the sentence was based upon consideration of the particular circumtances of the offense and the character of the offender. In reaching its conclusion, the Court recognized that the determination of whether a particular crime was suitable for the death penalty was a question particularly suited to resolution by state legislators and that "a heavy burden rests on those who attack

the judgment of the representatives of the people." Id. at 428 U.S. 175. "That States have authority to make aiders and abettors equally responsible, as a matter of law, with principals, or to enact felony-murder statutes is beyond constitutional challenge." Lockett v. Ohio, 438 U.S. 586 (1978).

Petitioner contends that, notwithstanding the legislative mandate of the will of the people of the State of Florida that the death penalty is appropriate in a felony murder case, the death sentence in Petitioner's case is disproportionate to the crime because Petitioner did not intend that the victims be killed and he was not present at the exact scene of the murders. However, the Court needs only to look at some of the facts of Petitioner's case in order to determine that his involvement in the crime was much more substantial that he would have the Court believe. For example, the trial court found as a matter of fact and as an aggravating circumstance that the murders were committed for pecuniary gain and that the robbery of the elderly Mr. Kersey was planned by Petitioner after he had personally observed Mr. Kersey with a large amount of money on his person. Enmund, supra, at 1372. The trial court stated that Petitioner was an accomplice in the capital felony and that his participation in the capital felony was major. The trial court also found that Petitioner actively participated in an attempt to avoid detection by causing the murder weapons to be destroyed or lost. Id. at 1373. Similarly, the Supreme Court of Florida found that it was reasonable for the jury to conclude that Petitioner was present in the getaway car merely a few hundred feet away from the murder scene and that Petitioner was the one who drove the getaway car when it was seen speeding away from the murder scene on the morning of the killings. Id. at 1365, 1370. Thus, when considering whether Petitioner's sentence was disproportionate to the crimes for which he was convicted, it must be remembered that his participation was major. Id. at 1373.

Again, however, despite the fact that Petitioner's participation in the murders was substantial, Petitioner claims that the death penalty was disproportionate in his case because he did not intend to kill. In support of this proposition, he relies heavily on Justice White's concurring opinion in Lockett, supra. Although Lockett's death sentence was reversed on other grounds, Justice White went further and expressed the view that the Eighth Amendment was violated by imposition of the death penalty "without a finding that the defendant possessed a purpose to cause the death of the victim." Id. at 438 U.S. 624. However, in a separate concurring opinion, Justice Blackmon strongly disagreed:

> I do not find entirely convincing the disproportionality rule embraced by my Brother White. The rule that a defendant must have had actual intent to kill, in order to be capitally sentenced, does not explain why such intent is the sole criterion of culpability for Eighth Amendment purposes. What if a defendant personally commits the act proximately causing death by pointing a loaded gun at the robbery victim, verbally threatens to use fatal force, admittedly does not intend to cause a death, yet knowingly creates a high probability that the gun will discharge accidentally? What if a robbery participant, in order to avoid capture or even for wanton sport, personally and deliberately uses grave physical force with conscious intent to inflict serious bodily harm, but not to kill, and a death results? May we as judges say that for Eighth Amendment purposes the absence of a "conscious purpose of producing death," post, at 628, 57 L Ed 2d, at 1004, transforms the culpability of those defendants' actions?
>
> Applying a requirement of actual intent to kill to defendants not immediately involved in the physical act causing death, moreover, would run aground on intricate definitional problems attending a felony murder. What intention may a State attribute to a robbery participant who sits in the getaway car, knows that a loaded gun will be brandished by his companion in the robbery inside the store, is willing to have the gun fired if necessary to make an escape but not to accomplish the robbery, when the victim is shot by the companion even though not necessary for

> escape? What if the unarmed participant stands immediately inside the store as a lookout, intends that a loaded gun merely be brandished, but never bothered to discuss with the triggerman what limitations were appropriate for the firing of the gun? What if the same lookout personally intended that the gun never be fired, but, after his companion fires a fatal shot to prevent the victim from sounding an alarm, approves and takes off?
>
> The requirement of actual intent to kill in order to inflict the death penalty would require this Court to impose upon the States an elaborate "constitutionalized" definition of the requisite mens rea, involving myriad problems of line drawing that normally are left to jury discretion but that, in disproportionality analysis, have to be decided as issues of law, and interfering with the substantive categories of the States' criminal law. And such a rule, even if workable, is an incomplete method of ascertaining culpability for Eighth Amendment purposes, which necessarily is a more subtle mixture of action, inaction, and degrees of mens rea.

Id. at 438 U.S. 614 n.2.

Justice Rehnquist reached a similar conclusion in even more direct terms:

> I finally reject the proposition urged by my Brother White in his separate opinion, which the plurality finds it unnecessary to reach. That claim is that the death penalty, as applied to one who participated in this murder as Lockett did, is "disproportionate" and therefore violative of the Eighth and Fourteenth Amendments. I know of no principle embodied in those Amendments, other than perhaps one's personal notion of what is a fitting punishment for a crime, which would allow this Court to hold the death penalty imposed upon her unconstitutional because under the judge's charge to the jury the latter were not required to find that she intended to cause the death of her victim. As my Brother White concedes, approximately half of the States "have not legislatively foreclosed the possibility of imposing the death penalty upon those who do not intend to cause death." Ante, at 625, 57 L Ed 2d, at 1002. Centuries of common-law doctrine establishing the felony-murder doctrine, dealing with the relationship between aiders and abettors and principals, would have to be rejected to

> adopt this view. Just as surely as many thoughtful moralists and penologists would reject the Biblical notion of "an eye for an eye, a tooth for a tooth," as a guide for minimum sentencing, there is nothing in the prohibition against cruel and unusual punishments contained in the Eighth Amendment which sets that injunction as a limitation on the maximum sentence which society may impose.

Id. at 438 U.S. at 635, 636. See also, Stein v. New York, 346 U.S. 156 (1953), where this Court previously upheld the death sentence of a defendant convicted of felony murder, although the defendant did not actually do the killing.

Thus, there is competent authority that a defendant's lack of intent to kill should not be a bar to the imposition of the death penalty. This is not to say, however, that in Florida the intent of a defendant convicted of felony murder is not relevant--evidence of a defendant's intent is properly admissible in mitigation during the sentencing phase of a capital trial. The jury's weighing of the aggravating circumstances versus mitigating circumstances has previously been upheld by this Court in Proffitt v. Florida, 428 U.S. 242 (1976). See also, Jacobs v. State, 396 So.2d 1113, 1117 (Fla. 1981), where the Supreme Court of Florida has recently stated that "the jury should be allowed to weigh all the facts and circumstances surrounding the homicide, so that their advisory verdict will be the result of reasoned judgment rather than an exercise in discretion." However, it is extremely significant to note that during the sentencing phase of Petitioner's trial, Petitioner offered absolutely no evidence in mitigation (R 1677).

Therefore, it is clear that under Florida law the degree, nature, and character of a defendant's mens rea in regard to the commission of the murder, while having little or no outward bearing on the question of guilt under the felony-murder concept, are highly relevant in the sentencing process and are admissible

n Florida in mitigation. As stated previously, Petitioner took an active part in the criminal transaction which resulted in his murder convictions. While it does not appear that he pulled the trigger, he was certainly free to present this fact in mitigation. Under Florida law, both the jury which renders an advisory sentence and the trial court which determines the actual sentence, are permitted to consider all the facts and circumstances of the crime, including the fact that the convicted felon did not intend to kill. This procedure is not constitutionally infirm. Proffitt, supra. Moreover, the fact that Florida law thus encourages those engaged in robbery to leave their guns at home and to persuade their coconspirators to do the same in the hope that fewer victims of robberies will be killed does not offend the Constitution.

CONCLUSION

The decision of what penalty to impose for a particular type of criminal conduct is one traditionally left with the lawmaking bodies of the various states. The state legislature is in the best position to determine the will of the people, and such legislative determination should not lightly be set aside. Gregg, supra. Although Petitioner was apparently not the triggerman in the two murders involved in his case, both the trial court and the Supreme Court of Florida found that his participation in the crimes was substantial in that he devised the idea for the robbery, planned the robbery, assisted in the perpetration of the robbery, drove the getaway car, and helped dispose of the murder weapons. That Florida has chosen to punish such reprehensible criminal conduct with a death sentence is not violative of the Constitution. Petitioner has simply not asserted a substantial federal constitutional question. Accordingly, Respondent respectfully requests that Petitioner's petition fcr writ of certiorari be denied.

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I HEREBY CERTIFY that a true and correct copy hereof has been furnished to WILLIAM C. MCLAIN, Assistant Public Defender, Chief, Capital Appeals, Hall of Justice Annex, 495 N. Carpenter Street, Bartow, FL 33830-3798, by U. S. Mail this 25th day of September, 1981.

George R. Georgiff
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CORRECTED COPY

No. 81-5321

ALEXANDER L. STEVAS, CLERK
DEC 28 1981
Office - Supreme Court, U.S.
FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

EARL ENMUND,

Petitioner,

against

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether death is an unconstitutionally excessive and disproportionate penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life?

2. Whether petitioner's degree of participation in the killings was given inadequate consideration and inadequate weight by the Florida courts, thereby violating his rights under the Eighth and Fourteenth Amendments?

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No. 81-5321

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

EARL ENMUND,

Petitioner,

against

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Florida affirming petitioner's convictions of first-degree murder and sentences of death by electrocution is reported in *Enmund v. State*, 399

So. 2d 1362 (Fla. 1981); A. 34-56.[1] The judgment and findings of fact on sentencing of the Circuit Court of Hardee County, Florida are unreported and appear at A. 25-26, 29-33.

JURISDICTION

The jurisdiction of this Court rests upon 28 U.S.C. §1257(3), the petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

The judgment of the Supreme Court of Florida was entered on April 16, 1981. A timely petition for rehearing was denied by that court on July 20, 1981. The petition for certiorari was filed on August 25, 1981, and granted on October 19, 1981. ____ U.S. ____, 50 U.S.L.W. 3300 (U.S.).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted ....

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[1]Numbers preceded by "A." refer to pages of the Joint Appendix; numbers preceded by "R." refer to transcript pages not reproduced in the Joint Appendix; numbers preceded by "S.R." refer to pages in the supplemental record on appeal not reproduced in the Joint Appendix.

and the Fourteenth Amendment to the Constitution of the United States, which provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property without due process of law.

This case also involves the following provisions of the statutes of the State of Florida, which are set forth in Appendix B to this brief: Fla. Stat. Ann. §§782.04, 921.141.

STATEMENT OF THE CASE

On April 1, 1975, Thomas and Eunice Kersey were robbed at their farmhouse in central Florida. R. 1084-85. In an exchange of gunfire that left one of the robbers wounded, Mr. and Mrs. Kersey were fatally shot. R. 1102, 1106. A Hardee County grand jury subsequently indicted Sampson Armstrong, his wife, Jeanette Armstrong, and petitioner Earl Enmund, a forty-three-year old black farmer, for the first-degree murder and robbery of the Kerseys. A. 1-3; R. 1467-70.

As the case comes to this Court, the Supreme Court of Florida has sustained petitioner Earl Enmund's sentence of death on findings: (i) that "the only evidence" linking him to the homicides is the "inference" that he was in a car 200 yards (R. 1037) from the Kerseys' home when his confederates in a robbery plan, the Armstrongs, killed the Kerseys (A. 49-50; *Enmund v. State*, 399 So. 2d 1362, 1370 (Fla. 1981));[2] and (ii) that "the killings were spon-

[2]Sampson Armstrong admitted to two witnesses who testified at trial that he and Jeanette Armstrong actually "pulled" the robbery (R. 3, 1207-08, 1347-52), and that he killed the Kerseys (R. 1207-08, 1347-52, 1354).

taneous and were precipitated by the armed resistance of Mrs. Kersey," who initiated the gun battle by shooting Jeanette Armstrong (*Armstrong v. State*, 399 So. 2d 953, 963 (Fla. 1981)[3]). The Florida Supreme Court held that these findings would support a sentence of death under "the felony murder portion of [Fla. Stat. Ann.] section 782.04(1)(a)" (A. 50; 399 So. 2d at 1370), although "the evidence does not establish that [petitioner] . . . intended to take life" (A. 51; 399 So. 2d at 1371).

In view of the Florida Supreme Court's explicit findings and conclusions, a detailed statement of the facts and proceedings below is unnecessary for consideration of the primary issue presented herein (Point I, *infra*)—whether petitioner's sentence of death is constitutionally excessive and disproportionate for an offense in which he neither took life nor intended or attempted to take life. Aspects of the proceedings below relevant to the second question presented (Point II, *infra*)—whether the Florida counts gave inadequate consideration and inadequate weight to petitioner's degree of participation in the Kersey killings—are developed within Point II.

SUMMARY OF THE ARGUMENT

I

Petitioner Earl Enmund was sentenced to die although he did not himself take life, intend to take life, or contemplate

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[3]Sampson Armstrong and petitioner were jointly tried, and were convicted and sentenced to die on the same evidence. In affirming petitioner's sentence of death, the Florida Supreme Court incorporated by reference parts of its earlier decision affirming Sampson Armstrong's sentence, including the statement quoted above. A. 55; 399 So. 2d at 1373, incorporating *Armstrong v. State*, *supra*, 399 So. 2d at 963.

that it would be taken by another. The State of Florida based that punishment exclusively on petitioner's "constructive" participation in a robbery during the course of which a confederate took life as the "spontaneous" result of gunfire initiated by one of the robbery victims.

In light of Earl Enmund's lack of personal responsibility for homicide, his sentence of death is unconstitutionally excessive and disproportionate under the Eighth and Fourteenth Amendments.

First, petitioner's individual culpability—the touchstone of a constitutional administration of the death penalty under the Court's recent Eighth Amendment jurisprudence—is no different than that of any accomplice to a non-homicidal felony. Certainly, it is no greater than that of the principal participant in a serious felony short of homicide, on whom the death penalty may not constitutionally be inflicted. *Coker v. Georgia*, 433 U.S. 584 (1977). Because there is no rational way to distinguish Earl Enmund from any other participant in a non-homicidal felony based on what each did and intended, or on the risk of death created by each, the fact that identical risks fortuitously result in death in one case, but not in the other, cannot provide grounds for allowing Earl Enmund to be executed while forbidding such punishment for other non-homicidal felons.

This conclusion is further compelled by contemporary society's almost total rejection of death as an appropriate punishment for an accomplice to robbery who did not take life or intend that it be taken by another. During the past two centuries, and with progressively greater unanimity over the last decade, the agencies charged with making and enforcing the criminal laws—legislators and judges, clemency executives and jurors—have manifested an unwillingness to inflict the extreme punishment in the absence of some action or intention on the defendant's part directed at taking life.

Finally, punishing Earl Enmund with death for the results of the homicidal actions of another has neither deterrent efficacy nor any retributive justification in the absence of an intention on petitioner's part that such homicidal results come to pass.

II

Both the trial court and the Florida Supreme Court took inadequate account of petitioner's degree of participation in the crime for which he was sentenced to death, in violation of his rights under the Eighth and Fourteenth Amendments. First, the Florida courts did not even consider petitioner's degree of participation in the killings and lack of intent to kill as independent mitigating circumstances as required by *Lockett v. Ohio*, 438 U.S. 586 (1978). Second, the fact-finding process that underlies petitioner's death sentence did not afford him the reliable inquiry into the extent of his culpability and the reasoned determination as to why he should be executed for his role in the crime that is constitutionally demanded in order to support a decision to inflict society's most extreme punishment. Third, the Florida courts consigned petitioner to death even though there were no aggravating factors sufficient to outweigh the overwhelming mitigating force of his lack of intent to kill, thereby subjecting petitioner to a sentence which is palpably excessive and disproportionate punishment, particularly by contrast to Florida's treatment of other cases involving accessorial liability.

ARGUMENT

I. DEATH IS AN UNCONSTITUTIONALLY EXCESSIVE AND DISPROPORTIONATE PENALTY UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS FOR ONE WHO NEITHER TOOK LIFE, ATTEMPTED TO TAKE LIFE, NOR INTENDED TO TAKE LIFE

A. Introduction

As part of its comprehensive review of the constitutionality of capital punishment, the prevailing opinion in *Gregg v. Georgia*, 428 U.S. 153 (1976), undertook to "consider whether the punishment of death is disproportionate in relation to the crime for which it is imposed." *Id.* at 187. Considering that Eighth Amendment question "only with [regard to] the crime of murder, *and* when a life has been taken deliberately by the offender," the plurality was unable to conclude that "the punishment is invariably disporportionate to the crime." *Id.* (emphasis added). "It is an extreme sanction, suitable to the most extreme of crimes." *Id.*

In *Coker v. Georgia*, 433 U.S. 584 (1977), the Court considered the constitutionality of the death penalty for another "highly reprehensible" though less extreme offense. *Id.* at 597 (plurality opinion). It held that "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." *Id.* at 592.

Woodson v. North Carolina, 428 U.S. 280 (1976), presented an issue falling between *Gregg* and *Coker*. Woodson

had participated in a robbery during which a codefendant took the victim's life. Woodson's personal culpability was thus indistinguishable from Coker's in terms of what he had done or intended, or the risks created by his conduct; but because those risks had happened to materialize, the *consequences* of the robbery in which he had engaged included the death of a human being and, to that extent, resembled Gregg's. Identifying the resulting constitutional question as "whether imposition of the death penalty on petitioner Woodson would have been so disproportionate *to the nature of his involvement in the capital offense* as . . . to violate the Eighth and Fourteenth Amendment," 428 U.S. at 305 n.40 (plurality opinion) (emphasis added), the Court found it "unnecessary to reach [that] . . . question," *id.* Again in *Lockett v. Ohio*, 438 U.S. 586 (1978), the Court withheld decision on whether "the death penalty is constitutionally disproportionate for [an accessory in a robbery-murder] . . . who has not been proved to have taken life, to have attempted to take life, or to have intended to take life."[4] *Id.* at 609 n.16 (plurality opinion).

Petitioner's case once again presents the issue reserved in *Woodson* and *Lockett*: specifically, whether the State of Florida may constitutionally take Earl Enmund's life for an offense in which he neither took, attempted to take, nor intended to take, anyone's life. We address that issue in the remainder of this Point I from several perspectives developed by the Court's recent Eighth Amendment decisions. But the

[4]See also *Coker v. Georgia*, *supra*, 433 U.S. at 592, citing *Gregg v. Georgia*, *supra*, 428 U.S. at 187 n.35; "In *Gregg* . . . the Court's judgment was that the death penalty for deliberate murder was neither the purposeless imposition of severe punishment nor a punishment grossly disproportionate to the crime. But the Court reserved the question of the constitutionality of the death penalty when imposed for other crimes."

essence of our submission is simple, and bears statement at the outset:

From the point of view of his individual and personal culpability—what he did and what he intended—Earl Enmund is not rationally differentiable from Ehrlich Coker. His deliberate conduct created no greater danger of death to others than did Coker's. Fortuitiously, death of others did occur here, not in Coker's case. The question is whether that fortuity makes a constitutionally decisive difference.

We submit that it does not, and cannot, in the light of the consistent emphasis upon individual culpability—upon the characteristics of the particular offense and offender—that has animated this Court's entire Eighth Amendment jurisprudence of capital punishment since 1972. See, *e.g.*, *Harry Roberts v. Louisiana*, 431 U.S. 633 (1977); *Lockett v. Ohio*, *supra*. Once it is recognized that the Eighth Amendment forbids the treatment of "all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass," *Woodson v. North Carolina*, *supra*, 428 U.S. at 304 (plurality opinion), then Earl Enmund's technical guilt of first-degree murder by virtue of the interaction of the felony-murder rule and legal doctrines of accessorial liability can no longer warrant classing him among the Greggs, rather than admitting his factual identity with Ehrlich Coker, for purposes of the Constitution's prohibition of disproportionate and excessive punishment. To distinguish Enmund from Coker upon grounds that have no bearing on the individual culpability and fitness for punishment of each would trivialize the Eighth Amendment by a "dialectic . . . empty of reason," *Trop v. Dulles*, 356 U.S. 86, 125 (1958) (Justice Frankfurter, dissenting).

Under the Eighth and Fourteenth Amendments, as interpreted in *Gregg* and *Coker*, "a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." *Coker v. Georgia, supra*, 433 U.S. at 592. Accord, *Gregg v. Georgia, supra*, 428 U.S. at 173. "A punishment might fail the test on either ground," *Coker v. Georgia, supra*, 433 U.S. at 592, or as the "cumulative" result of a poor showing on both, *Furman v. Georgia*, 408 U.S. 238, 282 (1972) (Justice Brennan, concurring).

We show below that, under either test, the uniquely severe penalty of death is disproportionate and excessive punishment for an offense which, despite its seriousness, is simply not among "the most extreme of crimes." *Gregg v. Georgia, supra*, 428 U.S. at 187.

B. Petitioner's Sentence of Death Is Grossly Disproportionate to the Seriousness of His Crime

1. In view of the nature and degree of petitioner's participation in the offense for which he stands condemned, the death penalty here is as disproportionately severe as the one invalidated in *Coker v. Georgia*

The Cruel and Unusual Punishment Clause of the Eighth Amendment is in part directed " 'against . . . punishments which by their excessive . . . severity are greatly disproportioned to the offense charged.' " *Weems v. United States*, 217 U.S. 349, 371 (1910), quoting *O'Neil v. Vermont*, 144 U.S. 323, 339-40 (1892) (Justice Field,

dissenting). See *Rummel v. Estelle,* 445 U.S. 263, 271-77 (1980) (citing cases). Accordingly, "[a]lthough determining the range of available punishments for a particular crime is a legislative function, the very presence of the Cruel and Unusual Punishment Clause within the Bill of Rights requires . . . that courts decide whether particular" punishments authorized by a legislature fall afoul of this requirement of proportionality. *Furman v. Georgia, supra,* 408 U.S. at 433 (Justice Powell, dissenting).

Disproportionality analysis gauges the fitness of the penalty and "the nature of the conduct made criminal." *Powell v. Texas,* 392 U.S. 514, 531-32 (1968). Because "[t]here is no question that death as a punishment is unique in its severity and irrevocability," *Gregg v. Georgia, supra,* 428 U.S. at 187,[5] the Court has said that the death penalty demands more "considerate adaptation . . . to the degree of the crime"[6] than do other sanctions. *Rummel v. Estelle, supra,* 445 U.S. at 272, 275; *see Gregg v. Georgia, supra,* 428 U.S. at 187. Accordingly, it is essential to identify precisely the conduct for which petitioner Earl Eumund is being punished, in order to measure its fitness for the unique penalty of death.

Petitioner was convicted and sentenced to die under the felony-murder and accessorial-liability principles of Fla. Stat. Ann. §782.04(1)(a), as construed by the Supreme Court of Florida in *State v. Dixon,* 283 So. 2d 1, 11 (Fla. 1973), and *Adams v. State,* 341 So. 2d 765, 768-69 (Fla. 1976). A. 45-48; R. 1553. Those principles "allow for a

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[5]Accord, *e.g., Rummel v. Estelle, supra,* 445 U.S. at 263, 272; *Gardner v. Florida,* 430 U.S. 349, 357-58 (1977) (plurality opinion); *Woodson v. North Carolina, supra,* 428 U.S. at 305.

[6]*Weems v. United States, supra,* 217 U.S. at 365.

particularly harsh application of the death penalty to any defendant who has aided or abetted the commission of a . . . robbery in the course of which a person is killed, even though accidentally," *Lockett v. Ohio, supra,* 438 U.S. at 613 (Justice Blackmun, concurring), through interaction of the principal offender's "strict"[7] liability for deaths occurring during the perpetration of a felony, and the accomplice's "constructive"[8] liability for the acts of the principal offender.

As the Supreme Court of Florida has described the first branch of this interaction, the

> felony murder rule mechanically defines as murder any homicide committed while perpetrating or attempting to perpetrate a felony. It stands as an exception to the general rule that murder is homicide with the specific intent of malice aforethought. Under the felony murder rule, state of mind is immaterial. Even an accidental killing during a felony is murder. The malice aforethought is supplied by the felony, and in this manner the rule is regarded as a constructive malice device.

Adams v. State, supra, 341 So. 2d at 767-68 (footnotes omitted); accord, *Mahaun v. State,* 377 So. 2d 1158, 1160 (Fla. 1979).

The second step is to extend the principal felon's responsibility for capital murder to all *accomplices* in the felony by yet another "constructive . . . device":

> [A]n individual who personally kills another during the perpetration or attempt to perpetrate one of the enumerated felonies is guilty of first degree murder. . . .

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[7] "[T]he felony-murder rule . . . assigns strict liability for homicide committed during the commission of a felony." ALI, MODEL PENAL CODE §210.2, Comment, at 15 (Official Draft and Revised Comments 1980) (hereinafter cited as "(1980)").

[8] *See Pope v. State,* 94 So. 865, 871 (1922).

> Moreover, the felon's liability for first degree murder extends to all of his co-felons who are personally present. As perpetrators of the underlying felony, they are principals in the homicide.

A. 46, quoting *Adams v. State, supra,* 341 So. 2d at 768.

Under these doctrines, it is immaterial that the homicide occurred "accidentally" and was not "actually contemplated" by the felonious design in which the accomplices shared. *Hampton v. State,* 336 So. 2d 378, 380 (Fla. App. 1976); see *Pope v. State,* 94 So. 865, 872 (1922). Moreover, the requirement that accomplices be "personally present" is attenuated by a Florida rule that such "presence" need not be "actual," but is also constructively supplied, so long as the accomplice was "sufficiently near and so situated as to . . . encourage . . . the actual perpetrator." A. 49; 399 So. 2d at 1370, quoting *Pope v. State, supra,* 94 So. at 871.

Only by virtue of "the unusual degree to which [these doctrines] . . . require [ ] capital punishment of a mere aider and abettor in [a] . . . felony resulting in a fatality," *Lockett v. Ohio, supra,* 438 U.S. at 616 (Justice Blackmun, concurring), could and did the Supreme Court of Florida justify its affirmance of petitioner's death sentence. It did not dispute his factual contention that "the evidence does not establish that he intended to take life" (A. 51), nor could it have disputed that proposition on this record. For the record establishes at worst that petitioner associated himself with a plan "[t]o rob" Mr. and Mrs. Kersey,[9] and sat "under the

[9]The only evidence at trial concerning the scope of the felonious plan is in Jay B. Neal's description of his conversation with Sampson Armstrong:

> Q Did Sampson tell you why he went out there?
>
> A Huh?
>
> Q Did Sampson tell you why he went out there?
>
> A Why he went out there?
>
> Q Yes, to begin with?
>
> A To rob them.

(R. 1351).

wheel" of the getaway car "about 200 yards west of the [Kerseys'] home" (R. 1037, 1039) while the robbery took place. By Sampson Armstrong's own admissions, it was Sampson with "his old lady," Jeanette Armstrong, who actually "pulled" the robbery (R. 3, 1348), and who shot and killed both victims after Mrs. Kersey opened fire on Jeanette (R. 1347-52, 1207-08). That the killings were no part of the robbery plan is manifested by the Florida Supreme Court's description of them as "spontaneous" and "precipitated by the armed resistance of Mrs. Kersey."[10] A. 55; 399 So. 2d at 1373, incorporating *Armstrong v. State, supra,* 399 So. 2d at 963. That petitioner took no part in them is manifested by its finding that "the only evidence of the degree of his participation is the jury's likely inference that he was the person in the car . . . near the scene of the crimes" (A. 49), making him legally "a principal of the second degree, constructively present aiding and abetting [Sampson Armstrong's] . . . commission of the . . . robbery" during which Armstrong killed the Kerseys. A. 50.[11]

At most, therefore, petitioner's own conduct for which he has been sentenced to be executed is his before- and after-the-fact participation in the non-homicidal crime of robbery. His "individual culpability"[12] begins and ends there.

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[10]The jury was instructed to find petitioner guilty of first-degree murder, regardless of whether or not "there was a premeditated design or intent to kill," if he was "engaged in the perpetration of robbery" during which life was taken by "someone acting in consort [sic] with" him. A. 6, 8, 9.

[11]By the Supreme Court's own definition of its terms, these findings necessarily mean that petitioner did not commit either the robbery or the homicide "with his own hands" (A. 47), and that he was not "actual[ly]" present during the commission of either offense. A. 49.

[12]*Stanislaus Roberts v. Louisiana,* 428 U.S. 325, 333 (1976) (plurality opinion), quoting *Furman v. Georgia, supra,* 408 U.S. at 402 (Chief Justice Burger, dissenting).

Whether gauged by act or by intention, it is patently no greater than Ehrlich Coker's.

Coker and petitioner both committed serious felonies that do not contemplate the taking of human life. Both thereby created a risk — which in neither case was found to have been deliberately incurred or even foreseen—that, by setting in train a series of events, the death of another person might result.[13] Fortunately, in Coker's case the risk did not materialize. In petitioner's case it did. That is the only difference between them.

It is also the only difference between petitioner and any other accessory to a robbery. They create the same risks of harm to human life; but in only some cases do the risks come to pass. Petitioner did nothing more than any other accessory to make them come to pass. Surely, "that degree of respect due the uniqueness of the individual" which requires "individualized consideration as a constitutional requirement in imposing the death sentence," *Lockett v. Ohio, supra,* 438 U.S. at 605, forbids the subjection of petitioner alone to capital punishment by happenstance, when nothing *he* has done or intended sets him apart from Coker or other non-homicidal felons[14] in regard to "relevant facets of the

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[13]Coker not only threatened his victim and her husband with a knife, but later held it to her throat before releasing her. See *Coker v. Georgia, supra,* 433 U.S. at 587 (plurality opinion).

[14]In a per curiam opinion in *Eberhart v. Georgia,* 433 U.S. 917 (1977), the Court followed *Coker* by summarily reversing death sentences for kidnapping as well as rape. In *Gregg,* the Court noted that the Supreme Court of Georgia had "effectively foreclosed" that State's death penalty for armed robbery because it was " 'excessive or disproportionate to the penalties imposed in similar cases.' " *Gregg v. Georgia,* 428 U.S. at 224 (opinion of Justice White); *id.* at 205-06 (plurality opinion), quoting *Gregg v. State,* 233 Ga. 117, 127, 210 S.E.2d 659, 667 (1974).

character and record of the individual offender or the circumstances of the particular offense," *Woodson v. North Carolina, supra,* 428 U.S. at 304. The whole thrust of this Court's concern for a rational administration of capital punishment that focuses upon the individual offender and his offense as the basis for determining the appropriateness of a death sentence[15] requires that, unless petitioner's case can be distinguished from Coker's in dimensions relevant to personal culpability, it cannot be constitutionally distinguished at all. And plainly, it cannot.

2. In view of the objective indicia of society's contemporary rejection of death as a punishment for merely accessorial liability in an unintentional felony-murder, petitioner's sentence is disproportionately severe

The same conclusion is supported by "a careful inquiry into [the] objective indicators of society's 'evolving standards of decency' "[16] to which the Court looks in assessing a punishment's "contemporary"[17] acceptability. To these we next turn.

a. History and traditional usage

"As advised by recent cases," *Coker v. Georgia, supra,* 433 U.S. at 593, we seek guidance first in the "history and

[15] *E.g., Lockett v. Ohio, supra,* 438 U.S. at 601-05; *Harry Roberts v. Louisiana, supra,* 431 U.S. at 636-37; *Woodson v. North Carolina, supra,* 428 U.S. at 303-04; *Gregg v. Georgia, supra,* 428 U.S. at 189.

[16] *Coker v. Georgia, supra,* 433 U.S. at 603 (Justice Powell, concurring).

[17] *Gregg v. Georgia, supra,* 428 U.S. at 173.

traditional usage" of capital punishment for accessories convicted of unintended homicides under the felony-murder rule. *Woodson v. North Carolina, supra,* 428 U.S. at 288. We note at the outset that nothing in our submission challenges the felony-murder rule itself, so long as it *is* not used as the exclusive basis for inflicting capital punishment upon a defendant who has neither killed nor intended death. Nevertheless, to appreciate its significance when it is so used, its background and highly artificial character in general must be recognized.

The criminal law requirement "of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American jurisprudence." *Dennis v. United States,* 341 U.S. 494, 500 (1951) (opinion of Chief Justice Vinson). "The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette v. United States,* 342 U.S. 246, 250 (1952). "Although Blackstone's requisite 'vicious will' has been replaced by more sophisticated and less colorful characterizations of the mental state required to support criminality, . . . intent generally remains an indispensible element of a criminal offense." *United States v. United States Gypsum Co.,* 438 U.S. 422, 437 (1978). See also, *e.g., United States v. Freed,* 401 U.S. 601, 607 (1971).

As has frequently been recognized, the felony-murder rule and its attendant vicarious-liability doctrines are exceptions to this "common law . . . scheme;" they "base [ ] conviction of murder not on proven culpability with respect to homicide, but on liability for another [and here another's] crime." ALI, MODEL PENAL CODE §210.2, Comment, at 36

(1980).[18] Although the rule itself remains widespread, "[t]he traditional humanity of modern Anglo-American law"[19] has resulted over the past two centuries in an increasingly concerted recognition on both sides of the Atlantic that its employment to enhance a felon's punishment through strict liability for unintended deaths arising from his felony has no validity where "the death penalty is authorized . . . . Sanctions of such gravity demand justification, and their imposition must be premised on the confluence of conduct and culpability." *Id.*[20]

In England, where the felony-murder rule originated, its marriage to the death penalty has frequently been described as an accident of history.[21] At earliest common law, all felonies except petty larceny were capital crimes, but neither attempts nor accidental killings were punishable at all.

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[18]See also, *e.g.*, *People v. Washington*, 62 Cal. 2d 777, 44 Cal. Rptr. 442, 402 P.2d 130, 134 (1965); *Commonwealth ex rel. Smith v. Myers*, 438 Pa. 218, 261 A.2d 550, 553 (1970).

[19]*Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947) (plurality opinion).

[20]The drafters of the Model Penal Code are not the only authorities who, in considering felony-murder, have distinguished death from all other penalties imposed for the offense. See *e.g.*, O. HOLMES, JR. THE COMMON LAW 58 (1881) (noting the currency of the felony-murder rule but taking comfort that "the law . . . does not nowadays often inflict death in such cases"); F. STROUD, MENS REA 173 (1914); Turner, *The Mental Element in Crimes at Criminal Law*, 6 CAMB. L.J. 31, 65 (1936); Hurst, *Criminal Law: The Felony Murder Doctrine Repudiated*, 36 KY. L. REV. 106, 108-09 (1946). See also 3 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 84 (1883).

[21]See generally, 3 J. STEPHEN, note 20, *supra*, at 57-58 (1883) (pointing out that Coke's importation of the capital felony-murder doctrine into more recent English law was based on a misreading of Bracton, since Bracton "did not say [felony-murder] was in his day punishable with death").

When the felony-murder rule arose, it served the single purpose of allowing the same penalty to be exacted for foiled felonies resulting in accidental homicide as the law already provided for all accomplished felonies, *i.e.*, death.[22] Thus, while bridging a gap in the substantive law of crimes, it exposed the putative felon to no different dimension of punishment than was commonplace, indeed accepted as inevitable, for the felony he had attempted. Since "it was immaterial whether a man was hanged for one felony or another,"[23] the concept of transferred or constructive malice had no seriously anomolous effect and it received little attention until the death penalty was abolished for most non-homicidal felonies in the 1830's.[24] See generally, *Woodson v. North Carolina, supra,* 428 U.S. at 289.

Even before the 1830's—indeed, from the moment the felony-murder rule was conceived—its effect was substantially dissipated by judge and jury nullification, as well

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[22]R. PERKINS, THE CRIMINAL LAW 44 (1969).

[23]*Powers v. Kentucky*, 110 Ky. 386, 413, 61 S.W. 735, 742 (1901).

[24]3 J. STEPHEN, note 20, *supra*, at 76 (1883).

as by royal pardon.[25] By 1953, the Royal Commission on Capital Punishment could report that "in practice [the felony-murder doctrine] . . . ha[d] been dead for many years," since its application "in effect [was] . . . limited to cases where the proper verdict would be [intentional] . . . murder even if there were no such [constructive malice] doctrine."[26] And in 1957, Parliament culminated a long history of legislative reform efforts by relegating unin-

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[25]This practical amelioration of the felony-murder doctrine through judge and jury nullification began as early as the Fourteenth Century, M. HUNARD, THE KING'S PARDON BEFORE A.D. 1307, at 98-99 (1969), and continued until the rule was legislatively abolished in 1957. Thus, the historical literature is replete with examples of (i) English judges inviting juries to convict of non-capital manslaughter, when a strict application of the common law of felony-murder required capital-murder verdicts, and, (ii) English juries, when not given that leeway by the judge, simply acquitting guilty defendants. *E.g.*, ALI MODEL PENAL CODE, §210.2, Comment, at 32 n.76 (1980); Turner, note 20, *supra*, at 55-56, 64; Wyndam, *Constructive Murder and Felonious Intent*, 34 L. MAGAZINE & REV. 461 (1902).

In cases in which the judge or jury did not relieve the defendant of capital punishment for unintended death occurring during a felony, the Home Secretary often did by granting executive clemency. *E.g.*, ROYAL COMMISSION ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE 1949-1953, at 24 (Home Office memorandum noting its practice of "strongly" considering commutation in cases of "constructive murder" in which there is "the absence of intent"); 3 J. STEPHEN, note 20, *supra*, at 57 & n.3, 85 ("The absence of a positive intention to kill, or to inflict an injury" in felony-murder situations was "perhaps the commonest case for the commutation of sentence under the existing law" at the end of the Nineteenth Century; for example, clemency granted to three defendants sentenced to die for taking part in a robbery during which one ofthem shoved the victim causing him to die of a heart attack); Wechsler & Michael, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 1261, 1309 n.116 (1937) ("premeditation" crucial in Home Office deliberations on clemency in the 1930's).

[26]ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT 31-33.

tentional killing during a felony to manslaughter, thereby removing it from England's then-extant death penalty for murder.[27]

A reluctance to impose capital punishment for any but intentional homicides has also characterized the American experience. The earliest manifestation of this trend was the Great Law of William Penn, promulgated in 1682 for the American colony of Pennsylvania, which, until repealed by Parliament in 1718, not only abolished the death penalty for non-homicidal felonies, but also for homicides short of those committed "willfully and premeditatedly."[28] When Pennsylvania again revised its murder laws in 1792 (thus commencing the American trend toward dividing murder into degrees in order to limit the breadth of capital punishment[29]), it was first proposed by Pennsylvania Supreme

[27]English Homicide Act of 1957, 5 & 6 Eliz. 2, c. 11. Section 1 of the Act limited murder to "killing . . . done with . . . malice aforethought," and expressly abolished the "constructive malice" doctrine for homicide "in the course . . . of some other offense." Section 5(2) of the Act provided one of them shoved the victim causing him to die of a heart attack); in the case of any of them who by his own act caused the death of, or inflicted or attempted to inflict, grevious bodily harm on" the victim, "but the murder shall not be capital murder in the case of any other of the persons guilty of it." See ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT, Appendix 12, at 467-74 (describing the various legislative proposals, going back to the 1830's, to limit or abolish capital punishment, though not criminal liability, for unintended homicides resulting from felonies). In 1965, England abolished the death penalty even for premeditated murders. Murder (Abolition of Death Penalty) Act of 1965, 8 Halisbury's Stat. of England 541.

[28]Charter to William Penn and Laws of the Province of Pennsylvania, Passed Between 1682 and 1700, at 144 (1879). See Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759, 760-63 (1949); McCafferty, *Major Trends in the Use of Capital Punishment*, 1 AMER. CRIM. L.Q., No. 2, at 9, 12 (1964).

[29]See *Woodson v. North Carolina*, *supra*, 428 U.S. at 290; *Mullaney v. Wilbur*, 421 U.S. 684, 692-93 (1975); *McGautha v. California*, 402 U.S. 183, 197-98 (1971); *Fisher v. United States*, 328 U.S. 463, 484 (1946) (Justice Frankfurter, dissenting).

Court Justice William Bradford that first-degree (*i.e.*, capital) murder be limited exclusively to "willful, deliberate and premeditated killing."[30] Although the Pennsylvania Senate subsequently included a felony-homicide provision in the definition of first-degree murder, it did limit the provision's scope to only four felonies.[31] Justice Bradford's proposal, and the Pennsylvania statute actually adopted, presaged reforms by other state legislatures during the Nineteenth Century designed, for the most part, to reduce drastically (and in a few States to abolish) the categories of unintentional homicides for which capital punishment could be imposed.[32] Other innovations were also made in the law of homicide during this period, but it has been authoritatively stated that "dissatisfaction" with imposing capital punishment according to the "broad criteria of implied malice was . . . the strongest motive for adopting grading in the history of the reform."[33]

As the Court has noted, the Nineteenth Century degree statutes themselves were "uniformly unsuccessful" at

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[30]W. BRADFORD, AN INQUIRY HOW FAR THE PUNISHMENT OF DEATH IS NECESSARY IN PENNSYLVANIA 35 (1792); *Keedy*, note 28, *supra*, at 769-72.

[31]4 Journal of the Senate (Pa. 1794).

[32]See ALI, MODEL PENAL CODE §210.2, Comment, at 18-20, 32-36, 40-42 (1980); Alderstein, *Felony Murder: A Statutory Taxonomy*, 4 AM. J. CRIM. L. 249, 251-62, 264-65 (1975-76).

[33]Wechsler, *Degrees of Murder and Related Aspects of the Penal Law of the United States*, in ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, MINUTES OF EVIDENCE, 784, 785. In their comments annotating the Model Penal Code, Professor Wechsler and his successor conclude that the distinctions drawn by the felony-murder degree statutes made logical sense *only* as efforts to "speak to the question of capital punishment." ALI, MODEL PENAL CODE, §210.2, Comment, at 20 (1980).

codifying the classes of murder for which juries were willing to impose the penalty of death. Because large-scale jury nullification continued to occur, additional reforms were adopted, under which juries were given discretion with regard to the imposition of capital punishment. *McGautha v. California,* 402 U.S. 183, 197-99 (1971); see *Woodson v. North Carolina, supra,* 428 U.S. at 291. Prominent among the categories of "first-degree" murder for which "[j]uries continued to find the death penalty inappropriate," *id.*, was unintentional felony-murder, particularly when extended to accomplices of the actual perpetrator of the homicide.[34] The well-documented experience of the State of New York is illustrative.

In 1936, after Governor Lehman asked the New York Law Revision Commission "to consider the desirability" of modifying the State's definition of felony-murder,[35] the Commission determined that the felony-murder doctrine was encountering substantial "disapproval,"[36] evidenced

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[34]See KENNEY, OUTLINES OF THE CRIMINAL LAW 139 (1933).

[35]LAW REVISION COMMISSION OF THE STATE OF NEW YORK, SECOND ANNUAL REPORT 17 (1936). It appears that Governor Lehman took this action because of the frequency with which he found himself commuting the death sentences of persons convicted of felony murder whose equally or more culpable accomplices, in severed trials, had either been acquitted or convicted of a lesser degree of crime. See Appendix C.

[36]This was so although by 1937 the New York Legislature had already limited the State's mandatory death penalty for first-degree felony-murder to homicides committed during the course of a handful of felonies, and the New York courts had further limited the doctrine by taking an extremely narrow view of the duration of the underlying felony during which the felon was strictly and capitally liable for any resulting deaths. See generally, Wechsler, note 33, *supra,* at 784; Note, *The Two-Trial System in Capital Cases,* 39 N.Y.U.L. REV. 50, 50-51 & n.10 (1964).

not only by "the difficulty of securing convictions by juries under a rule contrary to the prevailing feeling," but also by "the evasions or artifices of the courts" in restrictively construing the doctrine.[37] LAW REVISION COMMISSION OF THE STATE OF NEW YORK, THIRD ANNUAL REPORT 666, 668 & n.444 (1937). The Commission particularly criticized the State's first-degree felony-murder rule for imposing capital "liability on the defendant whose accomplice has committed homicide in the course of a felony," finding it "defective not in its substantive provision," but instead in its requirement that all of the

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[37]As in England, see note 25, *supra*, a good bit of judicial nullification has characterized the history of capital felony-murder in this country. See generally, ALI, MODEL PENAL CODE, §210.2, Comments, at 34-35 & nn.81-90 (1980) (collecting cases, and noting that limiting interpretations occur "most frequently in cases where the act of killing is done by someone other than the accused"); note 18, *supra*.

Furthermore, in the two or three jurisdictions in this country with well-established pre-*Furman* traditions of appellate review of capital sentences, see Hall, *Reduction of Criminal Sentences on Appeal*, 37 COLUM. L. REV. 521 (1937), a consensus early developed not only that "there can be no more aggravated killing" than one that was "deliberately planned," *id.* at 531, but also that death sentences should be reduced in cases in which (i) there was not a strong showing of premeditation, or (ii) the offender was not the actual perpetrator of the homicide, even where the perpetrator himself was executed. *E.g.*, *State v. Hall*, 176 Neb. 295, 125 N.W.2d 918 (1964) (uncertain from the evidence if defendant was the actual perpetrator; death sentence reduced to life); *Wesley v. State*, 112 Neb. 360, 199 N.W. 719 (1924) (death sentence of youthful non-triggerman reduced to life); *Fritz v. State*, 8 Okla. Cr. 342, 128 Pac. 170 (1917) (death sentence for accidental death resulting from killing during a felony reduced to life).

accomplices "pay the extreme penalty of death." *Id.* at 699-700.[38]

The Law Revision Commission proposed solving these problems by limiting first-degree (*i.e.*, capital) felony-murder "to cases in which there exists some element" of *mens rea*, and by limiting the accomplice's liability to instances in which the felonious confederacy encompassed any "agreement to kill." *Id.* at 673, 697. However, as in so many other jurisdictions, *see Woodson v. North Carolina*, *supra*, 428 U.S. at 291-92, the legislature chose instead to moderate the effect of capital punishment in felony-murder cases by giving juries discretion to recommend life sentences in such situations[39]—an innovation, notably, that the legislature did not find necessary with regard to *intentional* first-degree murder for an additional quarter century.[40]

Like judge and jury nullification of the death penalty for unintended homicides resulting from felonies, "[e]xecutive clemency" has historically provided a "common means of avoiding [such] . . . questionable executions." *Louisiana ex rel. Francis v. Resweber*, 329 U.S. at 477 (Burton, J., dissenting). Where available, the records of gubernatorial pardons reveal a steady flow of commutations to felony-

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[38]Professor Wechsler attributes the legislative reform that grew out of the Commission's report "mainly [to] the fear of jury nullification in cases where accomplices are not of equal culpability in relation to the homicide." Wechsler, note 33, *supra*, at 784. Accord, Ludwig, *Foreseeable Death in Felony Murder*, 18 U. PITT. L. REV. 51, 53 & n.7 (1956).

[39]N.Y. Laws 1937, c. 67. See *Williams v. New York*, 337 U.S. 241, 247 (1949) (characterizing this statutory reform as consistent with the "modern philosophy of penology that the punishment should fit the offender and not merely the crime.")

[40]*See* Note, note 36, *supra*, at 50-51 & n.10.

homicide offenders whose accidental perpetration of, or limited participation in, the homicidal act convinced the executive of an absence of homicidal intent.[41] Where statistical data are available, they, too, demonstrate the historically important role played in capital clemency decisions by the offender's lack of premeditation and by the executive's desire to calibrate the punishment received by felony-murder accomplices more accurately to their relative degrees of responsibility for the homicide and thus to avoid a result that "does not correspond to the feeling of the population."[42] 3 UNITED STATES DEPARTMENT OF JUSTICE, SURVEY OF RELEASE PROCEDURES, PARDON 64 (1939).

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[41]Such commutations are numerous. Petitioner has collected a number of illustrative examples in Appendix C.

[42]For example, a study of the "major themes recurring in governors' statements in justifying commutation" of death sentences in North Carolina between 1909 and 1954 demonstrate that, aside from a jury's or judge's recommendation of commutation and mental disorder, the prisoner's lack of premeditation on the criminal act is the most frequently cited reason for commuting death sentences to terms of imprisonment—and its importance grew steadily over the period studied. Johnson, *Selective Forces in Capital Punishment*, 36 SOC. FORCES 165, 167-68 (1957). Accord, Wolfgang, Kelly & Nolde, *Comparison of the Executed and Commuted among Admissions to Death Row*, 53 J. CRIM. L. CRIM. & POL. SCI. 301 (1953) (study of 62 commutations in Pennsylvania between 1914 and 1958, of which a third were based either on lack of premeditation, the offender's not being personally responsible for the homicide, or both); see W. SMITHERS, TREATISE ON EXECUTIVE CLEMENCY IN PENNSYLVANIA 166 (1909); Barnett, *The Grounds of Pardon*, 17 J. CRIM. L. CRIM. & POL. SCI. 490, 503 (1927).

The authors of the most comprehensive study of American executive clemency practices in capital cases conclude that "the commuting of the death sentences to peripheral participants in conspiratorial murders dramatizes the imperfection of a law which attaches equal punishment for acts with differing degrees of culpability." Note, *Executive Clemency in Capital Cases*, 39 N.Y.U.L. REV. 136, 164 (1964).

As the Court has frequently held, the Eighth Amendment's "applicability must change as the basic mores of society change." *Furman v. Georgia, supra,* 408 U.S. at 382 (Chief Justice Burger, dissenting). The history and traditional usage of capital punishment for accessorial liability in felony-murder cases in this country and England reveal a marked erosion over the past two centuries in the degree to which the mores of contemporary Anglo-American society have tolerated the execution of felons who did not intentionally—and particularly who did not personally—take the life of another. We next show that this trend has accelerated dramatically in this country during the past decade.

b. Contemporary legislative judgments

"In a democracy the first indicator of the public's attitude" toward a given punishment for a given crime "must always be found in the legislative judgments of the people's chosen representatives." *Furman v. Georgia, supra,* 408 U.S. at 436-37 (Powell, J., dissenting). Since *Furman,* almost every jurisdiction in the country that previously had a capital-sentencing statute has substantially revised it. As a whole, the recent legislative judgments thus expressed reveal a strong and growing consensus "weigh[ing] very heavily on the side of rejecting capital punishment as a suitable punishment" for vicarious felony-murder, *Coker v. Georgia, supra,* 433 U.S. at 596.

Of the 37 state and federal jurisdictions in this country that now authorize the death penalty, fully 29 do not permit its imposition on the sole basis of the defendant's participation in a robbery resulting in a homicide, where the defendant neither committed the homicidal act nor intended or

contemplated its commission. In only 8 jurisdictions including Florida is an accomplice made eligible for death on the ground of his unadorned participation in a robbery during which someone else kills.

Specifically, 14 jurisdictions require some culpable mental state with regard to the homicide—usually intent—as a prerequisite to conviction of the capital degree of that crime.[43] Four additional states require proof beyond a

[43]Eleven jurisdictions make knowing, intentional, or premeditated killing an element of capital murder. 1981 Ala. Acts, §2(b), incorporating Ala. Code §13-A-6-2(a)(1) ("intent to cause the death of another person"); La. Crim. Code Ann. §14.30(1) (1981 Supp.) ("specific intent to kill"); Mo. Rev. Stat. §§565.001, 565.008 (Supp. 1981) (premeditation and deliberation); N.H. Rev. Stat. Ann. §630:1(I) (Supp. 1979) ("knowingly cause the death of another"); N.Y. Penal Law §125.27(1)(a)(iii) (McKinney Supp. 1980) (see *People v. Davis*, 43 N.Y. 2d 17, 400 N.Y.S.2d 735 (1977)) ("intent to cause the death of another"); Baldwin's Ohio Legisl. Serv. 1981, at 5-165 (S.B. No. 1), §§2903.01(B), (D) [enacted following *Lockett v. Ohio*, *supra*] ("purposely . . . cause the death of another"); 18 Pa. Cons. Stat. Ann. §§1102, 2502(a) (Purdon's 1981) ("intentional killing"); Tex. Penal Code Ann., §§19.02(a)(1), 19.03(a)(2) ("intentionally or knowingly causes the death of an individual" *and* "intentionally commits the murder in the course of [a felony]"); Utah Code Ann. §76-5-202(1) ("intentionally or knowingly causes the death of another"); Va. Code Ann. §18-2-31(d) ("willful, deliberate and premeditated killing"); Wash. Legisl. Serv. 1981, No. 3, ch. 138, §2, incorporating Wash. Rev. Code Ann. §9A.32.030(1)(a) ("premeditated intent to cause the death of another").

In addition, three states require proof of some mental state short of intent to justify imposition of the death penalty. Ark. Stat. Ann. §41-1501(1)(a) (Supp. 1979) ("extreme indifference to . . . life"); Del. Code, Tit. 11, §§636(2), (4) (1981 Supp.) ("recklessly" or "negligently" cause death during the commission of a felony); Baldwin's Ky. Rev. Stat. §507.020(b) ("extreme indifference to human life" and "wanton . . . conduct which creates a grave risk of death . . . and thereby causes death"). As analyzed in the recently revised commentary to the Model Penal Code, these formulations require proof of an actual "awareness" on the defendant's part "of the creation of substantial homicidal risk;"

(continued)

reasonable doubt of intentional homicide before allowing felony-murder to serve as an aggravating circumstance warranting infliction of the death penalty.[44] Seven more exclude felony-murder altogether from their lists of aggravating circumstances that will support a death sentence.[45] Two jurisdictions expressly preclude the death penalty in cases such as petitioner's by reason of the defendant's nonparticipation in the homicidal act.[46] And two more limit the

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"inadvertent risk creation, however, extravagant and unjustified," will not suffice. ALI, MODEL PENAL CODE §210.2, Comment, at 21, 26 n.57, 27-28, 30 (1980). See Ark. Stat. Ann. §41-1501, Official Commentary of the Attorney General; Baldwin's Ky. Rev. Stat. §507.020 Commentary (adopting the "consciousness of risk" requirement and noting, with particular reference to accessorial liability in felony-homicide situations, that *each* accomplice's "participation in [the] felony" must itself "constitute[] wantonness manifesting extreme indifference to human life").

[44]Ill. Rev. Stat., ch. 38, §9-1(b)(6)(b) (Smith-Hurd Supp. 1978) ("intentionally" killed the victim); Ind. Code Ann. §35-50-2-9(b)(1) ("intentionally" killed the victim); N.M. Stat. Ann. §31-30A-5(b) ("intent to kill"); N.C. Gen. Stat. §15A-2000(e)(5), as interpreted in *State v. Cherry*, 257 S.E.2d 551, 567-68 (N.C. 1979) (absent proof of "willful, deliberate and premeditated murder" under N.C. Gen. Stat. §14-17, conviction of felony-murder precludes use of that same felony to supply the felony-murder aggravating circumstance in *id.* §15A-2000(e)(5)).

[45]Ariz. Rev. Stat. §13-703(F); Colo. Rev. Stat. Ann. §16-11-103(6); Idaho Code §19-2515(f); Mont. Rev. Codes Ann. §46-18-303 (1979); Neb. Rev. Stat. §29-2523(1) (Supp. 1979); Okla. Stat. Ann. Tit. 21, §701.12; S.D. Comp. Laws §23A-28-1 (Supp. 1980). Missouri, which is already accounted for in note 43, *supra*, and accompanying text, also precludes use of felony murder as an aggravating circumstance. Mo. Rev. Stat. §565.012(2) (Supp. 1981).

[46]49 U.S.C. §1473(6)(D) (absolute defense to the death penalty if defendant's participation in the killing was "relatively minor"); Md. Crim. Law Code Ann. §413(e)(1) (reserving death penalty for actual perpetrators of killings, *i.e.*, "principal[s] in the first degree").

(continued)

death penalty for felony-homicides to exceedingly narrow situations not involved in cases like petitioner's.[47]

Accordingly, Florida is joined by only 7 other jurisdictions of this nation[48] in a legislative judgment that mere participation in a robbery during which another robber takes life justifies the death penalty. But this does not end the matter. For the dramatic trend away from Florida's position has accelerated even during the course of the last decade.

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All told, including states already accounted for in notes 43-45, *supra* and accompanying texts, eight capital-sentencing jurisdictions make a defendant's lack of participation in the fatal act a defense to the death penalty at least so long as the defendant did not intend the death of the victim. See 1981 Ala. Acts §2(c), incorporating Ala. Code §13A-2-23 (non-participant in homicidal act not liable for death penalty absent intent to kill); Ark. Stat. Ann. §41-1501(2) (no liability for capital murder where defendant did not either commit or aid in the "homicide act itself"); Colo. Rev. Stat. Ann. §16-11-103(5) (absolute defense to the death penalty if defendant's participation in the killing was "relatively minor"); Ill. Rev. Stat., ch. 38, §9-1(b)(6)(a) (felony-murder aggravating circumstance unavailable unless the defendant "actually killed" the victim); Baldwin's Ohio Legisl. Serv. 1981, at 5-163 (S.B. No. 1), §2929.04(A)(8) (felony-murder aggravating circumstance unavailable unless the defendant actually perpetrated the killing or had previously "calculated" on taking and formed a "design" to take life during the felony); Va. Code Ann. §18.2-18 (1981 Cum. Supp.) ("except in case of killing for hire . . . an accessory before the fact or principal in the second degree to a capital murder shall be . . . tried . . . as though the offense were [non-capital] murder in the first degree").

[47]Conn. Gen. Stat. Ann. §§53a-54b(5), (7) (West Supp. 1980) (capital felony-murder limited to rape and kidnapping); Vt. Stat. Ann., Tit. 13, §§2303(b), (c) (capital murder reserved for offenders who commit a second unrelated murder or murder of a correctional officer).

[48]Cal. Penal Code §§189, 190.2(a)(17)(i) (West. Supp. 1980); Ga. Code Ann. §§26-1101(b), 27-2534.1(b)(2) (Supp. 1980); Miss. Code Ann. §§97-3-19(2)(e), 99-19-101(5)(d) (Supp. 1979); Nev. Rev. Stat. §§200.030(1)(b), 200.033(4) (1979); S.C. Code §§16-3-10, 16-3-20(C)(a)(1) (Supp. 1980); Tenn. Code Ann. §§39-2402, 39-2404(i)(7) (Supp. 1980); Wyo. Stat. Ann. §§6-4-101, 6-4-102(h)(iv) (Supp. 1980).

Thus, none of the eight jurisdictions that have enacted new death-penalty statutes since 1978 authorize capital punishment for nothing more than the defendant's participation in a robbery scheme during which life is taken by another.[49]

More and more, therefore, it is the reasoned judgment of "the State representing organized society" (*Gregg v. Georgia, supra,* 428 U.S. at 192) that death is an excessive punishment for unintended homicides, and particularly those actually committed by another. As the Supreme Court of Alabama noted in discussing that State's statutory requirement of intent for capital murder:

> The felony-murder doctrine has been severely criticized, primarily because in a variety of fact situations it often operates to charge an individual with first degree murder when the accused did not have the required intent for murder or when the homicide was the result of the actions of a third party over whom the accused had little or no control. . . . The use of the felony-murder doctrine is considered particularly harsh in the capital punishment context, where constitutional safeguards and public attitudes demand that the extreme penalty be meted out only for the most reprehensible crimes. As one commentator has observed, "[T]he death penalty is an untenable sanction for negligent or accidental homicide." It was, no doubt, this dissatisfaction with the doctrine which led our legislature to prohibit its use in the trial of capital felonies.

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[49]See the Alabama, Colorado, Connecticut, Maryland, Ohio, Pennsylvania, South Dakota and Washington statutes cited in notes 43, 45, 46, *supra.*

Ex parte Ritter, 375 So. 2d 270, 274 (Ala. 1979).[50]

c. Jury determinations

Although marked, the accelerating legislative trend against authorizing the death penalty for vicarious, unintended felony-homicides does not completely reflect the extent to which contemporary standards of decency have evolved away from actually imposing the punishment for that species of crime. American legislatures, of course, consistently rely upon "[j]ury sentencing . . . in capital cases in order 'to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a

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[50]Accord, Ark. Stat. Ann. §41-1501, Official Commentary of the Attorney General (the inclusion of a *mens rea* requirement for capital felony murder in the Arkansas statute was compelled by doubts whether "a miscreant who engaged in a non-capital offense should be subject to capital punishment for a death in respect to which he had no culpability or only such culpability as would ordinarily lead to manslaughter rather than murder liability").

"[T]he climate of international opinion" (*see Coker v. Georgia, supra,* 433 U.S. at 596 n.10) is also strongly opposed to death as a sanction for unintentional homicides. Thus, "[c]onstructive malice is unknown in . . . Western Europe . . . . Although the provisions of law in these countries differ from one another in many respects, intent to kill . . . is invariably a necessary element in those more serious forms of homicide which correspond more or less closely to [capital] murder . . . ." ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT 43. Even Commonwealth countries inured to the English concept of implied malice early removed unintentional felony-homicides from the category of capital murder. See LAW REVISION COMMISSION OF THE STATE OF NEW YORK, THIRD ANNUAL REPORT 670 (1937) (New Zealand, 1908; Canada, 1927); Indian Penal Code, §§299-300.

maturing society.' " *Gregg v. Georgia, supra,* 428 U.S. at 190, quoting *Witherspoon v. Illinois,* 391 U.S. 510, 519 n.15 (1968), and *Trop v. Dulles, supra,* 356 U.S. at 101 (plurality opinion). It is in the crucial interface between statutory authorizations and juries' assessments of the fitness of the extreme penalty for particular offenders that the full force of contemporary society's rejection of the death penalty for accomplice liability in unintended felony-murders becomes clear.

Accessible data illustrate the American jury's repudiation of capital sentencing in such cases in two ways.[51] First, a search of all reported opinions in post-1954 cases of executions for homicides reveals only 6 cases out of 362 in which clearly identifiable felony-murder nontriggermen were executed. The last such execution occurred in 1955, a

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[51]Harry Kalven, Jr. and Hans Zeisel first brought this trend to light. See Kalven & Zeisel, *The American Jury and the Death Penalty*, 33 U. CHI. L. REV. 769 (1966), reprinted in H. KALVEN & H. ZEISEL, THE AMERICAN JURY 435-49 (1971). In a study of 111 jury trials in potentially capital cases, the authors compared the guilt and sentencing verdicts of the juries with the verdicts that the presiding judges considered consistent with the law. *Id.* at 770. Noting that "[t]he felony murder rule is the harshest instance of strict liability in our criminal law," Professors Kalven and Zeisel concluded that often "the jury will not accept the legal fiction of intent" embodied in that rule and, in accomplice cases, frequently "rebels at imposing the death penalty for the vicarious responsibility of the defendant." *Id.* at 775-76. The authors found that felony-murder/accomplice factors generated far more jury leniency than any other factor measured during the study. *Id.* at 777. They were surprised to find that jury-judge disagreement with regard to felony-murder did not occur on the issue of guilt or innocence—juries being as likely as judges to convict defendants of felony murder—but only on the issue of the death penalty. *Id.* at 771 n.6, 776 n.10.

quarter-century ago.[52] By contrast, there were 72 executions for rape in this country between 1955 and the decision in

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[52]This survey was conducted by searching for reported opinions in all post-1954 cases of executions for homicide listed in the inventory in W. BOWERS, EXECUTIONS IN AMERICA 200-401 (1974), as well as in the four cases in which executions have occurred since that book was published. The complete survey, including the citation of all 362 cases found, is set forth in Appendix D to this brief. In his concurring opinion in *Lockett*, Justice White reports an earlier survey conducted by counsel for petitioner. See 438 U.S. at 624 & nn.6, 7. Recent scholarship has uncovered several additional written opinions in cases in Bowers' inventory, see Dressler, *The Jurisprudence of Death by Another: Accessories and Capital Punishment*, 51 COLO. L. REV. 17 (1979); and three persons have been executed since 1978. A numbering error in the *Lockett* survey has also been corrected in displaying the present survey in Appendix D.

In addition to six clearly identifiable felony-murder nontriggermen, our survey found two executions for vicarious liability in non-felony murders where the executed person intended that the homicide occur and hired others to commit it (a class of case having no bearing on petitioner's submission herein), and 14 other cases in which the facts were not reported in sufficient detail to reveal whether the executed person was or was not a nontriggerman.

In Dressler, *supra*, the author undertook a similar study. Professor Dressler has generously provided counsel for petitioner with the data underlying that study. It diverges from our survey in that (i) it includes several rape cases not relevant to our survey, and (ii) it counts as "accessories" (as opposed to "perpetrators") eight offenders who by their own hands "inflicted wounds on the victim," but who happened not to strike "the more likely lethal" blow. *See id.* at 66-68 & n.299. In the survey in Appendix D, all persons actually participating in the battery of the victim are "triggermen." Despite these methodological discrepancies, the surveys reach the same essential conclusion: those persons convicted of felony-murder over the past quarter century who had no role in the death of the victim either by action or solicitation (and who therefore probably did not intend that life be taken) were almost never executed. See *id.* at 67-68 (reporting that "non-causal") (*i.e.*, not murder-for-hire) "accessories"—including ones who actively assisted in killing the victim, but did not strike the blow that actually killed—comprised only 3 percent of persons executed between 1955 and 1979).

Coker v. Georgia,[53] so that executions for homicides not clearly committed or intended by the person executed have been far less prevalent in this country in modern times than the practice declared unconstitutional in *Coker.*

Contemporary rejection of the death penalty for murder convictions like petitioner's — where the defendant did not personally kill, was not present when the actual killer killed, and had not participated with the actual killer in a plot or design encompassing the taking of life — is even more starkly illustrated by a survey of the nation's present death-row population. As of October 20, 1981, there were 796 persons confined in the United States under active sentences of death for homicide.[54] Of the 739 for whom sufficient data are available to make a determination, only 41 did not personally participate in the fatal assault upon the victim. Of the 40 among these 41 for whom sufficient data are available, only 16 were not physically present when the fatal assault was committed. Of these 16, only 3, including petitioner,

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[53]UNITED STATES DEPARTMENT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, NATIONAL PRISONER STATISTICS BULLETIN, NO. SD-NPS-CP-3, CAPITAL PUNISHMENT 1974, at 16-17 (November 1975).

[54]See NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW U.S.A. (October 20, 1981), at 1 n.*.

This survey was conducted, first, by searching the reported and unreported appellate opinions that have been rendered in cases of persons presently on death row; second, by consulting trial judges' sentencing reports, where available; third, by telephonically contacting attorneys involved in the cases in which no appellate decision has yet been announced; and finally, in a few cases, by consulting newspaper accounts of capital trials. The complete survey, including the citations or docket numbers (where available) of all 796 cases is set forth in Appendix E.

were sentenced to die in the absence of a finding that they had collaborated with the killer in a specific design to kill.[55]

As a result, then, of innumerable expressions by juries of "the conscience of the community on the ultimate question of life or death," *Witherspoon v. Illinois, supra,* 391 U.S. at 519, the penalty of death in cases like petitioner's has become today all but extinct.[56] Its exceedingly rare appearance can only be described as "freakish" and "wanton," like "being struck by lightning." *Furman v. Georgia, supra,* 408 U.S. at 309-10 (Justice Stewart, concurring).

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[55]The remaining 12 either hired, or otherwise solicited, someone else to kill the victim, or participated in a felonious plan that included a design to kill the victim.

We recognize, of course, that the ultimate shape of the constitutional rule for which we contend would be more rationally framed as Justice White framed it in *Lockett v. Ohio, supra,* 438 U.S. at 624, in terms of intention to kill *vel non,* than in terms of (i) physical participation in the lethal act, (ii) presence at the site of the act, and (iii) participation in a plot to kill, if absent. But reliable data-gathering in large numbers of cases is enhanced by concentration upon more objective, frequently reported and readily identifiable facts; and for this reason we have focused our survey on three such facts that are each highly relevant to an intention to kill. See *id.* at 625 n.7 (Justice White, concurring). The remarkable absence of all three factors, or course, characterizes petitioner Earl Enmund's death sentence and provides the narrowest ground upon which the Court might set it aside as excessive under the constitutional principle developed in this Point I, if the Court preferred to reserve broader questions in the absence of less accessible data.

[56]"The ultimate judgment of the American people concerning the imposition of the death penalty upon . . . defendants [who do not intend to cause death] is revealed . . . by the frequency with which society is prepared actually to inflict the punishment of death. See *Furman v. Georgia,* 408 U.S. 238 (1972). It is clear from recent history that the infliction of death under circumstances where there is no purpose to take life has been widely rejected as grossly out of proportion to the seriousness of the crime." *Lockett v. Ohio, supra,* 438 U.S. at 625 (Justice White, concurring).

(continued)

3. Conclusion

Thus, the "objective evidence of the country's present judgment" (*Coker v. Georgia, supra,* 433 U.S. at 593) uniformly establishes that an individual's unadorned participation in a non-homicidal felony—be it the felony of rape as in *Coker* or the robbery here—without the intent to take life or to have another take it, cannot justify the death penalty based upon the fortuity that a homicide resulted from the acts of a confederate in the felony. Such participation is unquestionably "deserving of serious punishment" (*id.* at 598), but the objective judgment of history and contemporary society is that it does not rise to the enormity required for the extreme punishment of death.

(footnote continued from proceeding page)

The state courts have frequently remarked on this same phenomenon over the past decade. *E.g., Justus v. State*, 276 S.E.2d 242, 246 (Ga. 1981); *Jarrell v. State*, 216 S.E.2d 258, 270 (Ga. 1975); *State v. Rust*, 250 N.W.2d 867, 875 (Neb. 1977); *State v. Irwin*, 282 S.E.2d 439, 447 (N.C. 1981); *State v. Shaw*, 255 S.E.2d 799, 804 (S.C. 1979); *State v. Groseclose*, 615 S.W.2d 142, 149 (Tenn. 1981); *Clark v. Commonwealth*, 257 S.E.2d 784, 794-95 (Va. 1979). Furthermore, state appellate courts have not hesitated to reduce death sentences to life imprisonment for that reason, in the rare instances in which juries have imposed them on persons who did not take life or intend to take life. *Hall v. State*, 244 S.E.2d 833, 838-39 (Ga. 1978); see also *id.* at 839 & n.2, discussing *Hill v. State*, 229 S.E.2d 737 (Ga. 1976); *People v. Glecker*, 411 N.E.2d 849, 861 (Ill. 1980); *State v. Sonnier*, ___ So. 2d ___, No. 80-K-1846 (La. June 22, 1981); *Wallace v. State*, 618 S.W.2d 67 (Tex. Crim. App. 1981); *Warren v. State*, 562 S.W.2d 475, 476-77 (Tex. Crim. App. 1978).

C. Death Is a Purposeless and Excessive Punishment for Vicarious Liability in an Unintentional Felony Murder Because it Makes No Measurable Contribution to the Acceptable Goals of Punishment

"The death penalty is said to serve two principal social purposes"—"deterrence of capital crimes by prospective offenders" and "retribution." *Gregg v. Georgia,* 428 U.S. at 183. As applied to punish vicarious liability for unintentional felony-homicide, the death penalty serves neither purpose. It "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposelsss and needless imposition of pain and suffering." *Coker v. Georgia, supra,* 433 U.S. at 592.

1. Imposing the death penalty for unintended homicides committed by others during the course of felonies does not measurably increase the likelihood that such homicides will not occur in the future

Because " '[r]etribution is no longer the dominant objective of the criminal law,' " *Gregg v. Georgia, supra,* 428 U.S. at 183, *quoting Williams v. New York,* 337 U.S. 241, 248 (1949), the Eighth Amendment requirement of penological justification focuses heavily upon the claim of deterrent effectiveness of the death penalty for a given offense. In examining the deterrent value of the death penalty, the Court has taken the view that the proper inquiry is not whether capital punishment deters crime as a matter of some overall, undifferentiated generalization, but rather, for whom and for which crimes it can rationally be found to serve as a deterrent. *E.g., Lockett v. Ohio, supra,* 438 U.S. at 625 (Justice White, concurring); *Gregg v. Georgia, supra,*

428 U.S. at 185-86; *Furman v. Georgia, supra,* 408 U.S. at 455 (Powell, J., dissenting), quoting ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT at 24.

Pursuing this crime-specific analysis in *Gregg,* the Court upheld the constitutionality of the death penalty for deliberate murder in part because, as to that offense, common sense suggests that "the possible penalty of death may well enter into the cold calculus that precedes the decision to act." 428 U.S. at 186. The Court explicitly recognized, however, that in some situations where a homicide is *not* the result of a "calculated," "carefully contemplated," or "cold-blooded" decision to kill, "the threat of death has little or no deterrent effect." *Id.* at 184-86 & nn.30, 33.[57]

Since "[a]ll foresight of the future, all choice with regard to any possible consequence of action, depends on what is known at the moment of choosing," O. HOLMES, JR., THE COMMON LAW 55 (1881), "if a man does not foresee the consequences of his act he cannot appreciate that punishment lies in store for him if he does it."[58] Such is the

[57]See *Morissette v. United States, supra,* 342 U.S. at 250-51 ("A relationship between some mental element and punishment for a harmful act . . . has afforded the rational basis for a tardy and unfinished substitution of deterrence . . . in place of retaliation and vegeance as the motivation for public prosecution").

[58]G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 30 (1961). Modern criminal law scholarship repeatedly bears out Glanville Williams' observation. *E.g.,* A. GOLDSTEIN, THE INSANITY DEFENSE 12-13 (1967); H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 45 (1968); Hall, *Negligent Behavior Should Be Excluded from Penal Liability,* 63 COLUM. L. REV. 632, 641 (1963); Henry M. Hart, *The Aims of the Criminal Law,* 23 L. & CONTEMP. PROB. 401, 421-22 (1958). Scholarship in other legal fields has endorsed the same premise. *E.g.,* G. CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 56-57 (1970).

case of the person who associates himself in a felonious scheme with no intention to take life or contemplation that it will be taken by another.[59]

Nor is there any basis in fact for assuming that the likelihood of death occurring in a felony is so substantial that felony offenders who would not be deterred by the penalty affixed to the felony itself will nonetheless advert to that likelihood and be deterred by the death penalty that "lies in store" for it. Rather, the probability of death occurring during the commission of *any* serious felony, including robbery, is exceedingly low—about five in one thousand.[60]

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[59]Because of the absence of any requirement of homicidal intention, felony-murder has frequently been singled out as a paradigm of the offense for which the death penalty in particular has little or no deterrent efficacy. *E.g.*, Hon. James R. Browning, *The New Death Penalty Statutes: Perpetrating a Costly Myth*, 9 GONZ. L. REV. 651, 699 (1974); H.L.A. Hart, *Murder and Its Punishment: England and the United States*, 52 NW. U.L. REV. 433, 437 (1957); Morris, *Felon's Responsibility for Acts of Others*, 105 U. PA. L. REV. 50 (1956); Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1556, 1605-06 (1974); Wechsler, note 33, *supra*, at 785 & n.6.

[60]Relying upon three studies of solved and unsolved serious felonies committed in Cook County, Illinois in 1926 and 1927, Philadelphia between 1948 and 1952, and New Jersey in 1975, the drafters of the Model Penal Code concluded that "there is no basis in experience" for concluding that unintended deaths accompany felonies sufficiently often to justify capital punishment as a deterrent to that offense. ALI, MODEL PENAL CODE §210.2, Comment at 38 & n.96 (1980). Notably, New Jersey's figures cover a period during which that State did not impose the death penalty for any crime. The three studies reported the following data regarding the frequency of death resulting from robbery:

(continued)

And, as we have noted above, even in that .5% of cases, the likelihood of subsequent imposition of the death penalty is negligible. Such less-than-occasional imposition of the death penalty in a tiny fraction of highly abberational cases cannot be rationally supposed to have a deterrent effect. See generally, *Furman v. Georgia, supra,* 408 U.S. at 410 (Justice White, concurring). "[C]apital punishment can serve as a deterrent *only* when murder is the result of premeditation and deliberation." *Fisher v. United States,* 328 U.S. 463, 484 (1946) (Justice Frankfurter, dissenting) (emphasis added). Particularly in the case of unintended killings committed by a co-felon, the deterrent justification for that extreme punishment does not exist.

(footnote continued from proceeding page)

	No. of Crimes Reported	*No. Accompanied By Homicide*	*%*	*No. per 1000*
Cook County, Ill. (1926-1927)	14,392 (est.)	71	.49	4.9
Philadelphia (1948-1952)	6,432	38	.59	5.9
New Jersey (1975)	16,273	66	.41	4.1

Id. Accord, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 19 (1967) (study of robberies in Washington, D.C. in the 1960's showing that less than one half of one percent resulted in homicide).

2. Retributive justice is not measurably served by punishing unintentional felony-homicides with death

The absence on Earl Enmund's part of any intention to take life also deprives his death sentence of any retributive justification.

"The retributive theory presupposes moral guilt." G. WILLIAMS CRIMINAL LAW: THE GENERAL PART (30) (1961). It "rests on the idea that . . . because man is responsible for his acts, he ought to receive his just deserts." H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 37 (1968), cited in *Gregg v. Georgia, supra,* 428 U.S. at 183 n.29. In making Eighth Amendment judgments about the retributive value of the death penalty for a given offense, the inquiry therefore focuses on whether a person "deserved [that] punishment" in some moral and personal sense. *Rummel v. Estelle, supra,* 445 U.S. at 288 (Justice Powell, dissenting); see *Furman v. Georgia, supra,* 408 U.S. at 308 (Justice Stewart, concurring).

In assessing moral guilt and personal responsibility, our system of criminal law has traditionally relied on the mental element of crimes. See pp. 17-18, *supra*. Our traditions have insisted that "[p]unishment . . . obtain [ ] only when the deed is done with a state of mind that is reprehensible as well as unfortunate."[61] More specifically, Anglo-American criminal law has for the most part considered "an injury . . . inflicted by intention"[62] to be "critical to criminal culpability;" and, without exception, it has considered such an intention critical to "the *degree* of criminal culpability."

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[61]ALI, MODEL PENAL CODE, §210.2, Comments, at 36 (1980).

[62]*Morissette v. United States, supra,* 342 U.S. at 250.

Mullaney v. Wilbur, supra, 421 U.S. at 698, 702 (emphasis added).[63] It has accordingly been fundamental not only to the theory of retributive justice but to our system of criminal law as a whole that "causing harm intentionally must be punished more severely than causing the same harm unintentionally." H.L.A. HART, PUNISHMENT AND

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[63]In analyzing Eighth Amendment excessiveness claims, this Court has often remarked on the absence of a requirement of intentional wrongdoing in criminal statutes found unconstitutionally harsh. *E.g., Robinson v. California,* 370 U.S. 660, 667 (1962); *Weems v. United States, supra,* 217 U.S. at 363, 365; *O'Neil v. Vermont, supra* 144 U.S. at 337 (Justice Field, dissenting). See also *Godfrey v. Georgia,* 446 U.S. 420, 433 (1980) (death sentence invalidated because based on an interpretation of an aggravating circumstance that would apply to "any murder," rather than only to those murders evidencing "a consciousness [on the offender's part] materially more 'depraved' than that of any person guilty of murder").

On the other side of the coin, the Court and its individual members have relied on the intentional nature of a given offense to justify a conclusion that punishing it severely is justified under the Eighth Amendment. *E.g., Gregg v. Georgia, supra,* 428 U.S. at 184 n.30, 187; *Coker v. Georgia, supra,* 433 U.S. at 602 n.1, 603 (Justice Powell, concurring). *See Green v. Georgia,* 442 U.S. 95, 97 (1979) (intent to kill a "critical issue" at penalty phase of a capital trial); *Lockett v. Ohio, supra,* 438 U.S. at 616 (Justice Blackmun, concurring) ("nature of [defendant's] *mens rea* in regard to the commission of homicidal act" is particularly important at penalty stage of a capital trial); *Furman v. Georgia, supra,* 408 U.S. at 388 (Chief Justice Burger, dissenting) ("motive or lack of motive of the perpetrator" is a frequent basis on which juries decide whom to sentence to die).

RESPONSIBILITY 162 (1968).[64] In petitioner's case, it cannot be said that any retributively justifiable prescription of punishment proportioned to the degree of his personal responsibility and moral guilt has occurred. Rather, Earl Enmund has received the most severe penalty "even though," as the jury was instructed, "there [was] . . . no premeditated design or intent to kill," and no action on his part to kill. A.6. In such a situation, a death sentence does

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[64]As this Court demonstrated in *Smith v. California*, 361 U.S. 147 (1959) (imposing a scienter requirement in a First Amendment context), the imposition of an intent requirement as a prerequisite to the constitutional imposition of the death penalty would have no bearing on the State's general ability to define crimes and their mental elements as it chooses. What the Court said on this point in *Smith* concerning state action inhibiting expression is at least as applicable to "the action of the sovereign in taking the life of one of its citizens," *Gardner v. Florida*, *supra*, 430 U.S. at 357-58: certain "legal devices and doctrines [that] in most applications [are] . . . consistent with the Constitution . . . cannot [constitutionally] be applied." *Smith v. California*, *supra*, 361 U.S. at 150-51. Accordingly, as did *Gardner*, *Beck v. Alabama*, 447 U.S. 625, 638 n.14 (1980), and *Lockett v. Ohio*, *supra*, 438 U.S. at 605 n.13, this case presents a proper occasion for "draw[ing] a 'bright line' between the punishment of death" and all other situations potentially affected by the Eighth and Fourteenth Amendments. *Rummel v. Estelle*, *supra*, 445 U.S. at 275.

Furthermore, an intent requirement would present "no unique hardships" in the administration of capital-murder statutes. *Mullaney v. Wilbur*, *supra*, 421 U.S. at 702. As the Court has noted in a variety of contexts, "courts and juries every day pass upon knowledge, belief and intent—the state of men's minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred." *American Communications Ass'n v. Douds*, 339 U.S. 382, 411 (1950); accord, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-67 (1975); *United States v. United States Gypsum Co.*, *supra*; *Mullaney v. Wilbur*, *supra*, 421 U.S. at 702; *Smith v. California*, *supra*, 361 U.S. at 154; *United States v. Yellow Cab Co.*, 338 U.S. 338, 341-42 (1949).

not measurably, or even "marginally" or "negligibly," serve retributive justice, *Furman v. Georgia*, 408 U.S. at 312 (Justice White, concurring).

D. Conclusion

Nothing excepting Earl Enmund's participation in the robbery that led to Mr. and Mrs. Kersey's death at the hands of Sampson Armstrong has been put forward by the State of Florida to justify his death sentence. That justification is constitutionally insufficient. *Coker v. Georgia, supra.* In the absence of any other justification, a judgment to kill Earl Enmund—who himself did not kill, attempt to kill, or intend to kill—is "grossly out of proportion to the severity of the crime," and so utterly "needless" and "purposeless," *id.* at 592, that it cannot "accord with 'the dignity of man,' which is the basic concept underlying the Eighth Amendment." *Gregg v. Georgia, supra,* 428 U.S. at 173.

II

PETITIONER'S DEGREE OF PARTICIPATION IN THE KILLINGS WAS GIVEN INADEQUATE CONSIDERATION AND INADEQUATE WEIGHT BY THE FLORIDA COURTS, THEREBY VIOLATING HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS

In *Lockett v. Ohio, supra,* 438 U.S. at 604 (plurality opinion), four Justices of this Court concluded that

> the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering *as a mitigating factor* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

(emphasis in original) (footnotes omitted). A fifth member of the Court, Justice Blackmun, concurred on a narrower ground which focused specifically upon the most compelling mitigating factor presented in Sandra Lockett's case and now in Earl Enmund's: the sentencer must be permitted to consider

> the defendant's degree of participation in the homicide and the nature of his *mens rea* in regard to the commission of the homicidal act.

438 U.S. at 616. The following term, in *Green v. Georgia*, 442 U.S. 95, 97 (1979), a majority of eight Justices recognized that the mitigating factor identified in Justice Blackmun's *Lockett* concurrence is indeed a "critical issue" at the penalty phase of a capital trial. The Court accordingly invalidated a death sentence imposed without consideration of evidence that the defendant was not present during the killing and lacked any intent to kill.

In this case, both the trial court and the Florida Supreme Court approached the sentencing decision in a manner that denied any meaningful consideration to the mitigating factor deemed crucial in *Lockett* and *Green*. We examine below the processes through which this occurred, and their consequences. Viewed as either procedure or result, the decision to consign petitioner to death took inadequate account of the

degree of his participation in the crime for which he was being sentenced, and thus subjected him to cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments.

A. The Trial Court and the Florida Supreme Court Refused to Consider as an Independent Mitigating Circumstance Earl Enmund's Lack of Participation in the Killings and Total Absence of Homicidal Intent

Fla. Stat. Ann. §921.141(6)(d) directs the sentencer to consider as a mitigating circumstance the fact that "[t]he defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor." The trial court found that this mitigating circumstance was not present in petitioner's case because his "participation in the capital felony was major." A.54; 399 So. 2d at 1373. In so doing, it clearly (i) telescoped its consideration of the mitigating effect of petitioner's limited involvement in the Kersey killings into the exclusive mold of section 921.141(6)(d); and (ii) so construed that provision as to equate participation in the *robbery* with participation in the killings.[65] Both of these steps clearly flout this Court's square

[65]The latter interpretation is underscored by the trial court's finding that petitioner "planned the capital felony." A. 54; 399 So. 2d at 1373. There was no evidence at trial that Earl Enmund planned to kill anyone; at best there was evidence that he planned the robbery. The court further noted that petitioner "actively participated in an attempt to avoid detection by disposing of the murder weapons," *ibid.*, but that alone hardly renders his degree of participation "major." Indeed, Sandra Lockett also helped to hide the weapon used by the triggerman in her case. *Lockett v. Ohio*, *supra*, 438 U.S. at 590-91.

holding in *Lockett*.[66]

Viewing the evidence in the light most favorable to the prosecution, petitioner may have played a major role in a robbery; but the record simply will not support a finding that Earl Enmund played a major role in the killing of Mr. and Mrs. Kersey. Any such finding would have "no basis" in the constitutional sense, *e.g.*, *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957), unless participation in the underlying robbery plan is deemed tantamount to participation in an unplanned, "spontaneous" killing by another robber (see pp. 3-4, *supra*) within the meaning of Fla. Stat. Ann. §921.141(6)(d). The latter must have been the Florida Supreme Court's view when it held that "[t]he finding that no mitigating circumstances were present was not error." A.55; 399 So. 2d at 1373.

The procedure for weighing mitigating circumstances against aggravating circumstances is well established under Fla. Stat. Ann. §921.141(3). See, *e.g.*, *Elledge v. State*, 346 So. 2d 998 (Fla. 1977). Under this procedure, so long as there is a mitigating circumstance present in the case, reversal of an aggravating circumstance relied on by the trial court—as occurred here twice—requires reversal of the sentence as well. *Id.* at 1002-03. Because the Florida Supreme Court did not reverse petitioner's sentence, it plainly did *not* consider petitioner's relative uninvolvement in the Kersey killings as a mitigating circumstance, albeit an insufficient one; rather, the court refused to consider it as a mitigating circumstance at all, stating flatly that "[t]here are no mitigating circumstances" in this case. A.55; 399 So. 2d at 1373. Such an exclusive, narrow interpretation of section 921.141(6)(d) manifestly

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[66]The second step is also manifestly at odds with *Coker v. Georgia*, *supra*. See pp. 7-10, *supra*.

ignores the command of *Lockett* that the sentencer consider "any of the circumstances of the offense" proferred by the defendant in mitigation, 438 U.S. at 604, "as an independently mitigating factor," *id.* at 607. By foreclosing consideration of factors as crucial as Earl Enmund's limited participation in the killing and his total lack of intent to kill, Florida has done precisely what *Lockett* forbids. It has created and enhanced

> the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

Id. at 605.

B. The Trial Court and the Florida Supreme Court Failed to Engage in Any Precise, Consistent Fact-finding, Supported by the Record, as to the Extent of Earl Enmund's Participation in the Killing and Whether that Degree of Participation Merits Imposition of a Sentence of Death

In his concurring opinion in *Lockett v. Ohio*, *supra*, 438 U.S. at 616, Justice Blackmun recognized the constitutional necessity of establishing

> some limit to the method by which the States assess punishment for actions less immediately connected to the deliberate taking of human life.

This case illustrates that necessity only too well. As we shall develop below, Earl Enmund stands sentenced to die upon the basis of the most cursory, sloppy and inconsistent fact-finding imaginable in a case with human life at stake. The

Florida Supreme Court has repudiated those findings by the trial judge, but has nonetheless affirmed Enmund's death sentence without offering any substitute rationale to explain why the death penalty is appropriate for this defendant. If the Eighth and Fourteenth Amendments demand any "reliability in the determination that death is the appropriate punishment in a specific case," *Woodson v. North Carolina, supra*, 428 U.S. at 305, that command had been violated here.

(i)

Initially, the trial judge limited his findings to a brief oral statement, delivered in open court at sentencing on September 30, 1975, which recited in conclusionary form four of the aggravating circumstances set forth in Florida's death-sentencing statute. The judge made no findings at this time concerning petitioner's degree of participation, but merely tracked the language of Fla. Stat. Ann. §921.141(5)(d) in concluding that "this capital felony was committed while the Defendant was engaged in or was an accomplice in the commission of or the attempt to commit or flight after committing or attempting to commit a robbery." A.28. He added generally that "[t]he Court can find no mitigating circumstances as it applies [*sic*] to this Defendant." *Ibid.*

Although the trial judge stated on the record that "the Court will further set forth its reasons in a written judgment to be filed in the court files," A.28, no such judgment was forthcoming. Accordingly, on appeal the Florida Supreme Court remanded and directed the judge to prepare written findings. A.29.[67]

[67]Fla. Stat. Ann. §921.141(3) requires "specific written findings of fact" whenever the death penalty is imposed. See *Proffitt v. Florida*, 428 U.S. 242, 250, 259 (1976) (plurality opinion).

On April 22, 1977, nearly 19 months after pronouncing sentence, the trial judge finally issued his written findings. As noted at pp. 47-49, *supra*, he determined in the section on mitigating circumstances that petitioner was "an accomplice" whose participation was nonetheless "major" because he planned the robbery and actively participated in an effort to dispose of the murder weapons. A.32. On this basis, no mitigating circumstance was found. *Ibid.* In the section on aggravating circumstances, the court repeated its oral finding that the capital felony was committed "while the defendant Enmund was engaged, or was an accomplice, in the commission of, or an attempt to commit an armed robbery. FS 921.141(5)(d)." A.30. Then, in support of its finding that the capital felony was "especially heinous, atrocious or cruel" (Fla. Stat. Ann. §921.141(5)(h)—a finding later reversed by the Florida Supreme Court[68]—the trial court made the pronouncement, completely at odds with its other statements, that "it is only reasonable to conclude, and the Court so finds, that the defendant Enmund and the defendant Sampson Armstrong, each fired into the bodies of Mr. and Mrs. Kersey." A.31.

This pronouncement was utterly baseless and nothing short of irresponsible when stated by a court charged with the duty of deciding whether a defendant shall live or die—an "action of the sovereign . . . [which] differs dramatically from any other legitimate state action." *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977). There was not a shred of evidence that Earl Enmund ever set foot on the Kersey's property, and the only prosecution evidence as to his whereabouts placed

[68]A.55; 399 So. 2d at 1373.

him in a parked car two hundred yards away while the killings were taking place. R. 1025-27, 1030, 1037.[69]

The Florida Supreme Court properly disregarded the trial judge's groundless attribution of a gunman's role to Enmund, finding instead that

> the only evidence of the degree of [petitioner's] . . . participation is the jury's likely inference that he was the person in the car by the side of the road near the scene of the crimes. The jury could have concluded that he was there, a few hundred feet away, waiting to help the robbers escape with the Kerseys' money.

A. 49-50; 399 So. 2d at 1370. However, the court was apparently blind to the legal significance of this factual reversal. Having found that the only evidence placed petitioner away from the site of the killings, the Florida Supreme Court necessarily undercut a key premise of the trial court's decision to condemn petitioner to die. Under any orderly system of capital sentencing which considers—as *Lockett* requires—that the degree of a defendant's participation in a homicide is relevant to his proper punishment for it, the least that was required of the Florida Supreme Court was the

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[69]The trial court's proffered basis for its conclusion that petitioner Enmund participated in the shooting was (1) that Jeanette Armstrong had been "seriously wounded" by Mrs. Kersey's opening shots (A. 31); (2) that both Kerseys were shot by bullets from two different caliber guns; and (3) that they were shot "while in the prone position." (*ibid.*). But (1) there is no evidence in the record that Jeanette did not fire any shots, either before or after being hit; (2) even if one speculates that Jeanette never fired, there is no reason of record to suppose that Sampson Armstrong did not shoot both guns—picking up either Jeanette's or Mrs. Kerseys'; after all, it is Sampson Armstrong who said he shot both of the Kerseys and that he "made sure that the people was dead" (R. 1207-08); and (3) in any event, as the Florida Supreme Court expressly found, the evidence did *not* establish that Mr. and Mrs. Kersey were shot in a prone position.

course of action advocated by Justice Overton, dissenting from the affirmance of petitioner's death sentence:

> I . . . would remand for resentencing in view of the specific finding of the majority that the appellant did not actually participate in the shooting. In his sentencing order the trial judge found to the contrary, expressing the view in his findings of aggravating circumstances that the appellant was present and assisted in the commission of the murder. In my opinion, these contrary findings require a resentencing proceeding.

A. 56; 399 So. 2d at 1373.

(ii)

In *Gregg v. Georgia*, *supra*, 428 U.S. at 190, this Court recognized that

> accurate seentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die.

The sentencing authority accordingly must scrutinize not only the character, record and history of the defendant, but also the "particularized nature of the crime." *Id.* at 206. Thus, the sentencer is to be "guided and channeled by a system that focuses on the *circumstances of each individual homicide* and individual defendant in deciding whether the death penalty is to be imposed." *Proffitt v. Florida*, 428 U.S. 242, 258 (1976) (plurality opinion) (emphasis added). See also *Woodson v. North Carolina*, *supra*, 428 U.S. at 304; *Stanislaus Roberts v. Louisiana*, 428 U.S. 325, 333-34, (1976). Furthermore, in Florida any risk of an arbitrary or capricious result is supposed to be "minimized by Florida's appellate review system, under which the evidence of aggravating and mitigating circumstances is reviewed and reweighed

by the Supreme Court of Florida 'to determine independently whether the imposition of the ultimate penalty is warranted.' *Songer v. State*, 322 So. 2d 481, 484 (1975)." *Proffitt v. Florida*, *supra*, 428 U.S. at 253. The ultimate object of these safeguards is, of course, to guarantee that death sentences are based upon reliable fact-finding. *Beck v. Alabama*, 447 U.S. 625, 637-38 & n.13 (1980); *Green v. Georgia*, 442 U.S. 95 (1979); *Lockett v. Ohio*, *supra*, 438 U.S. at 604; *Gardner v. Florida*, *supra*, 430 U.S. at 359; *id.* at 364 (Justice White, concurring); *Woodson v. North Carolina*, *supra*, 428 U.S. at 305.

The slipshod approach of the Florida courts in this case makes a mockery of these principles. It would seem elementary that in *any* case in which the defendant plausibly contends that he did not kill, attempt to kill or intend to kill, and was not even present when the killing took place, the sentencer and reviewing court should at the very minimum make a serious effort to (i) find out what happened, and (ii) assess appropriate weight to that finding in relation to all other aggravating and mitigating circumstances in the case. Whether one agrees with Justice White's position in *Lockett* that death cannot constitutionally be imposed without a considered finding that the defendant possessed a conscious purpose to bring about the death of the victim (see Point I, *supra*) or with Justice Blackmun's position in that case that the numerous different levels of intent preclude the drawing of such a "bright-line" rule (438 U.S. at 614-15 n.2), an accomplice on trial for his life is at least entitled under the Eighth and Fourteenth Amendments to a reliable inquiry into the extent of his culpability and a reasoned determination why, even if the record does not reflect that he intended to produce death, he should nonetheless be executed for his role in the crime. That was not done in this case.

C. The Execution of Earl Enmund upon this Record Would Constitute Excessive and Disproportionate Punishment

This Court has long recognized that "it is a precept of justice that punishment for crime should be graduated and proportioned to the offense." *Weems v. United States, supra*, 217 U.S. at 367. Under any "objective consideration of the particularized circumstances of the individual offense and the individual offender" revealed by this record, *Jurek v. Texas*, 428 U.S. 262, 274 (1976) (plurality opinion), Earl Enmund's death sentence should be set aside as an excessive and disproportionate punishment forbidden by the Eighth and Fourteenth Amendments.

As noted previously, see pp. 51-52, *supra*, there is no evidence here that petitioner killed, attempted to kill or intended that anyone be killed. Even assuming *arguendo* in contrast to Point I, *supra*, that other circumstances might conceivably in some cases justify the execution of such a defendant, this is not such a case. Surely the fact of petitioner's involvement in the Kersey robbery alone is not sufficient. And while a lengthy record of violent crime might arguably outweigh a defendant's tangential participation in the capital offense, Earl Enmund has no such record: he served a one-year sentence for robbery eighteen years prior to the instant offense, and has since led a law-abiding life in his community as a farmer and father of four. R. 1467-70.

The Florida Supreme Court has on numerous occasions set aside death sentences imposed upon nontriggermen in far more aggravated cases. See *Taylor v. State*, 294 So.2d 648 (Fla. 1974) (defendant armed and present during robbery; active participant); *Slater v. State*, 316 So. 2d 539 (Fla. 1975) (defendant present during robbery; active participant);

McCaskill v. State, 344 So. 2d 1276 (Fla. 1977) (defendant armed and present during robbery; active participant); *Williams v. State*, 344 So. 2d 1276 (Fla. 1977) (following armed, active participation in robbery, defendant returned to scene and shot a witness who knew him in order to avoid being identified); *Malloy v. State*, 382 So. 2d 1190 (Fla. 1979) (defendant armed and present during robbery-kidnapping; Florida Supreme Court found he had intent to kill, *id.* at 1193); *Jacobs v. State*, 396 So. 2d 713 (Fla. 1981) (defendant armed, present at scene, fired at victims, and "actively participated in the murders," *id.* at 716); *Barfield v. State*, 402 So. 2d 377 (Fla. 1981) (defendant was active participant in murder-for-hire scheme; hired killers, showed them where to find victim, and suggested appropriate location for killing him); *Smith v. State*, ____ So. 2d ____, No. 56,005 (Fla. July 16, 1981) (defendant was active participant in beating of victim; ordered her execution in order to eliminate her as a witness).

In *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980), this Court held that "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor *and apply* its law in a manner that avoids the arbitrary and capricious imposition of the death penalty" (emphasis added). Florida has failed that test in this case. Earl Enmund's limited participation in the killings and total lack of intent to kill render this a constitutionally indefensible case for society's most "extreme sanction, suitable to the most extreme of crimes." *Gregg v. Georgia*, *supra*, 428 U.S. at 187.[70] And in comparison to the Florida cases described above, the execution of Earl Enmund would be palpably arbitrary and

[70]See also *State v. Dixon*, *supra*, 283 So. 2d at 7; "... the Legislature has chosen to reserve ... [the death penalty's] application to only the most aggravated and unmitigated of most serious crimes."

excessive. There is simply "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Godfrey v. Georgia, supra*, 446 U.S. at 433.

CONCLUSION

The judgment of the Supreme Court of Florida, insofar as it leaves the sentence of death undisturbed, should be reversed.

Respectfully submitted,

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APPENDIX B

STATUTORY PROVISIONS INVOLVED

At the time of petitioner's trial on September 24-30, 1975, the following provisions of the Florida Statutes were in effect: *Fla. Stat. Ann.* § *782.04*[1A]

[1A]Section 782.04 has been amended since petitioner's trial. It presently provides:

782.04 Murder

(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution or opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in s. 775.082.

(b) In all cases under this section, the procedure set forth in §921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in §775.082, §775.083, or §775.084.

(3) When a person is killed in the perpetration of, or in the attempt to perpetrate, any arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate

(continued)

782.04 Murder

(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, involuntary sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person 18 years of age or older when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in § 775.082.

(b) In all cases under this section, the procedure set forth in §921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) When perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, or when committed in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing,

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(footnote continued from preceding page)

such felony shall be guilty of murder in the second degree, which constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) The unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than any arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

placing, or discharging of a destructive device or bomb, except as provided in subsection (1), it shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment in the state prison for life or for such term of years as may be determined by the court.

(3) When perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb, it shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in §775.082, §775.083, or §775.084.

Fla. Stat. Ann. §*921.141*

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(1) Separate proceedings on issue of penalty— Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by §775.082. The proceeding shall be conducted by the trial judge *before* the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in Chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6)

and (7).[2A] Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist;[3A] and

(c) Based on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.

(3) Findings in support of sentence of death—Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of

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[2A]Since petitioner's trial, this sentence has been amended. It presently provides:

> In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6).

[3A]Since petitioner's trial, this sentence has been amended. It presently provides:

> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist.

death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.[4A] In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of facts based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with section 775.08.

(4) Review of judgment and sentence—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

[4A]Since petitioner's trial, this sentence has been amended. It presently provides:

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.[5A]

(6) Mitigating circumstances—Mitigating circumstaces shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

[5A]Since petitioner's trial, Fla. Stat. Ann. §921.141(5) has been amended to include an additional subsection, "(i)." Subsection "(i)" provides:

> (i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

APPENDIX C

COMMUTATIONS OF FELONY-MURDER DEATH SENTENCES IMPOSED ON ACCOMPLICES WHO NEITHER TOOK LIFE NOR INTENDED TO TAKE LIFE

Over the past century, governors in this nation have regularly commuted felony-murder death sentences of accomplices to non-homicidal felonies (*e.g.*, robbery, burglary, etc.) who did not themselves commit a homicidal act. The frequency of such commutations, and the reasons given for them, reveal a widespread conviction among state chief executives that the penalty of death is excessive punishment for persons who neither took life nor attempted or intended to take life. The governors' explanations also reveal a pattern of uneven jury nullification in severed felony-murder/accomplice cases, necessitating the use of executive clemency to relieve one accomplice of the death penalty when another equally or more culpable participant in the felony escaped conviction, or at least the death penalty, at the hands of a different jury.

Extensive documentation makes the reasons for commutations in New York particularly accessible. The following instances are illustrative:

PUBLIC PAPERS OF GOVERNOR GROVER CLEVELAND

1883-84. John B. Griffith's death sentence commuted because "Griffith did not, with his own hand, throw the explosive into the house, but that . . . was done by one of his companions," and because the other participants were sentenced to prison terms. (P. 319.)

PUBLIC PAPERS OF GOVERNOR FLOWER

1893. William H. Parker's death sentence commuted because he was not the triggerman in a robbery homicide, and the triggermen had been sentenced to life imprisonment. (Pp. 468-69.)

PUBLIC PAPERS OF GOVERNOR WHITMAN

1916. Onne Talas' death sentence commuted on recommendation of the Court of Appeals because he was convicted of felony murder and sentenced to die solely for letting the actual perpetrators of the robbery and homicide into his employer's house. The perpetrators, who tied up Talas in the basement before strangling the victim, escaped apprehension. (Pp. 365-68.)

1917. Elias Jarza's death sentence commuted on recommendation of the district attorney because Jarza "did not fire the shot which killed" the victim; rather, Jarza's accomplice was responsible for the killing. (Pp. 555-56.)

PUBLIC PAPERS OF GOVERNOR ALFRED E. SMITH

1920. Mahmout Blaza's death sentence commuted because "the person who did the actual killing has been [sentenced to prison] . . . , whereas the one who participated in the robbery [Blaza] has been [sentenced to death] . . . ." (P. 547.)

PUBLIC PAPERS OF GOVERNOR FRANKLIN D. ROOSEVELT

1931. Hyram Hirsch's death sentence commuted on recommendation of the trial judge because his co-defendant Goltz was "completely exonerated of a crime of which I feel he is equally guilty, and Hirsch, on the other hand, [is] . . . compelled to suffer the extreme penalty." (P. 517.)

PUBLIC PAPERS OF GOVERNOR HERBERT H. LEHMAN

1933-1937. Governor Lehman commuted death sentences in accomplice/felony-murder situations on a dozen occasions during these years, citing the absence of intent, the offender's not himself having taken life, and the lower sentences of the persons who did directly participate in the homicide: *1933*: Cornelius Johnson (p. 459); Vincent Garcia (p. 450); Linwood Washington (p. 450); Paul LoGiudice (p. 450);

1934: Antonio Gumbo, Sam Silverman and Lovell Landers pp. 601-02); *1935*: Matios Leylegian and Nishan Sarkisian; *1937*: Wentworth Springer, Lawrence Jackson and Robert Taliafero (p. 584).

PUBLIC PAPERS OF GOVERNOR THOMAS E. DEWEY

1947. Floyd Edgar Martin's death sentence commuted based on evidence that his accomplice committed the homicide. (P. 443.)

1949. Daniel Gentile's death sentence commuted in response to the district attorney's letter: "[T]he trial evidence does not indicate that [Gentile] was personally armed at the time of the killing. . . . While this circumstance furnishes no legal justification . . . it would seem pertinent on . . . clemency." (P. 466.)

1953. Al Keshner's death sentence commuted because of "the complete absence of intent to cause physical injury" and Keshner's "total failure to apprehend the tragic consequences that might and did result" from a scheme to commit arson, in which Keshner took part and in which a police detective died. (P. 975.)

PUBLIC PAPERS OF GOVERNOR AVERELL HARRIMAN

1955. Conception Estrada Correa's death sentence commuted, although his accomplices' death sentences were left intact, "because of his relatively minor role in [a robbery homicide], as a look-out." (P. 501.)

PUBLIC PAPERS OF GOVERNOR NELSON A. ROCKEFELLER

1961. Louis Manuel Rosario's death sentence commuted "primarily [because of] the uncertainty in the trial record as to which of the three defendants fired the fatal shot;" Rosario's robbery-homicide accomplices had been sentenced to prison. (P. 800.)

1963. Lorenzo Cantanzaro's sentence of death commuted because he was "the driver of the getaway car and did not participate in the actual shooting;" the jury recommended mercy for the triggerman but not Cantanzaro. See Note, *Executive Clemency in Capital Cases*, 39 N.Y.U.L. REV. 136, 164 (1964).

What records are available in other states indicate a similar preoccupation with felony-murder and accessorial issues in grants of executive clemency. For example:

CALIFORNIA

BIENNIAL MESSAGE OF GOVERNOR HIRAM W. JOHNSON TO THE LEGISLATURE OF THE STATE OF CALIFORNIA, 1917, at 58 (commutation of George P. Friedell's sentence because "he did not participate in the actual killing . . . and the person directly responsible for the homicide received considerations of clemency some years ago"); C. DUFFY, 88 MEN AND 2 WOMEN 84-88 (1962) (commutation of Carl Fellow's death sentence because he was not the triggerman and the proof of any intent to kill was dubious at best); Braithwaite, *Executive Clemency in California*, 1 ISSUES IN CRIM. 77, 100 (1963) (reporting commutation of Charles Golston's death sentence by Governor Edmund G. Brown, Sr., in part, because of the executive's reluctance to allow the execution of an offender whose malice existed only by virtue of the felony-murder rule).

COLORADO

REPORT OF THE STATE BOARD OF PARDONS, 1893-1894, at 26 (John Withers' murder sentence reduced in part because "[h]e did not know that murder was intended by the other participants").

GEORGIA

Hall v. State, 244 S.E.2d 833, 839 n.2 (Ga. 1978) (reporting the Board of Pardon's commutation of Hall's death sentence, apparently because the evidence was controverted as to whether Hall or his accomplice, who received a life sentence, actually killed the victim).

ILLINOIS

DIVISION OF PARDONS AND PAROLES, BIENNIAL REPORT, 1920-1922, at 23 (commutation of Ignatz Potz's death sentence because "[e]xecution of Potz would have been a disgrace to the State. He did not fire the shot which killed Peterson, the record in the case to the contrary notwithstanding").

OHIO

Ohio: M. DiSALLE, THE POWER OF LIFE OR DEATH, 78 (1965) (reporting Governor Davey's 1935 commutation of Rudy Ashbrook's death sentence because he was not the triggerman and his accomplice, who was, received a prison term); *id.* (reporting Governor Thomas Herbert's 1947 commutation of Charles L. Ames' death sentence who was only an accomplice to a burglary during which a co-felon shot a police officer); (James Louis Long's death sentence commuted by Governor DiSalle in 1962, despite Long's history of recidivism, because he was only "the driver of the [getaway] car," while "the actual murderer [was] given life).

APPENDIX D

SURVEY OF PERSONS EXECUTED IN THE UNITED STATES SINCE 1954

Methodological Note:

This survey was conducted by searching for reported appellate opinions in all post-1954 cases of execution for homicide listed in the inventory in Bowers, *Executions in America* 201-400 (1974).

Reported decisions were found for 360 such cases. In two additional cases—Jose Luis Monge (Colorado) and Gary Gilmore (Utah)—there was no appeal but the facts have been widely reported.

Findings:

Of the 362 cases listed, it is clear in 339 that the individual executed for homicide personally committed a homicidal assault. In two the person executed had others commit a homicide for him. In sixteen others the facts were not reported in sufficient detail to determine whether the person executed was a nontriggerman.

The survey uncovered only six cases in which clearly identifiable non-triggermen were executed: Two in New York, two in New Jersey, one in Florida, and one in Tennessee. All six were executed in 1955.

ALABAMA

1. *Bowen v. State*, 274 Ala. 66, 145 So.2d 421 (1962)
2. *Gosa v. State*, 273 Ala. 346, 139 So. 2d 321 (1962)
3. *Johnson v. State*, 272 Ala. 633, 133 So. 2d 53 (1961)
4. *Boggs v. State*, 270 Ala. 209, 116 So. 2d 903 (1959)
5. *Dockery v. State*, 269 Ala. 564, 114 So. 2d 394 (1959)
6. *Martin v. State*, 266 Ala. 290, 96 So. 2d 298 (1957)
7. *Johnson v. State*, 265 Ala. 360, 91 So. 2d 476 (1956)

ARIZONA

8. *State v. McGee*, 91 Ariz. 101, 370 P.2d 261 (1962)
9. *State v. Silvas*, 91 Ariz. 386, 372 P.2d 718 (1962)
10. *State v. Robinson*, 89 Ariz. 224, 360 P.2d 474 (1961)
11. *State v. Fenton*, 86 Ariz. 111, 341 P.2d 237 (1959)
12. *State v. Craft*, 85 Ariz. 143, 333 P.2d 728 (1958)
13. *State v. Jordan*, 83 Ariz. 248, 320 P.2d 446 (1958)
14. *State v. Coey*, 82 Ariz. 133, 309 P.2d 260 (1957)
15. *State v. Thomas*, 73 Ariz. 52, 275 P.2d 408 (1954)
16. *State v. Folk*, 78 Ariz. 205, 277 P.2d 1016 (1954)

ARKANSAS

17. *Moore v. State*, 231 Ark. 672, 331 S.W.2d 841 (1960)
18. *Bracy v. State*, 231 Ark. 647, 331 S.W.2d 870 (1960)
19. *Nail v. State*, 231 Ark. 70, 328 S.W.2d 836 (1959)
20. *Young v. State*, 230 Ark. 737, 324 S.W.2d 524 (1959)
21. *Hays v. State*, 230 Ark. 731, 324 S.W.2d 520 (1959)
22. *House v. State*, 230 Ark. 622, 324 S.W.2d 112 (1959)
23. *Walker v. State*, 229 Ark. 685, 317 S.W.2d 823 (1958)
24. *Lee v. State*, 229 Ark. 354, 315 S.W.2d 916 (1958)
25. *Moore v. State*, 227 Ark. 544, 299 S.W.2d 838 (1957)
26. *Boyd v. State*, 227 Ark. 544, 299 S.W.2d 838 (1957)
27. *Boone v. State*, 227 Ark. 544, 299 S.W.2d 838 (1957)
28. *Byrd v. State*, 227 Ark. 544, 299 S.W.2d 838 (1957)
29. *Leggett v. State*, 227 Ark. 393, 299 S.W.2d 59 (1957)
30. *Smith v. State*, 227 Ark. 332, 299 S.W.2d 52 (1957)
31. *Jenkins v. State*, 222 Ark. 511, 261 S.W.2d 784 (1953)

CALIFORNIA

32. *People v. Mitchell*, 48 Cal. Rptr. 371 (1966)
33. *People v. Bentley*, 58 Cal. 2d 858 (1962)
34. *People v. Darling*, 58 Cal. 2d 15 (1962)
35. *People v. Ditson*, 57 Cal. 2d 415 (1962)
36. *People v. Busch*, 16 Cal. Rptr. 898 (1961)

37. *People v. Garner*, 57 Cal. 2d 135 (1961)
38. *People v. Hughes*, 57 Cal. 2d 89 (1961)
39. *People v. Lane*, 56 Cal. 2d 868 (1961)
40. *People v. Carter*, 56 Cal. 2d 549 (1961)
41. *People v. Gonzalez*, 56 Cal. 2d 371 (1961)
42. *People v. Lindsey*, 56 Cal. 2d 324 (1961)
43. *People v. Combes*, 56 Cal. 2d 135 (1961)
44. *People v. Kendrick*, 56 Cal. 2d 71 (1961)
45. *People v. Rittger*, 55 Cal. 2d 849 (1961)
46. *People v. Robillard*, 55 Cal. 2d 88 (1960)
47. *People v. Baldonado*, 53 Cal. 2d 824 (1960)
48. *People v. Moya*, 53 Cal. 2d 819 (1960)
49. *People v. Duncan*, 53 Cal. 2d 803 (1960)[1]
50. *People v. Cartier*, 54 Cal. 2d 300 (1960)
51. *People v. Cooper*, 53 Cal. 2d 755 (1960)
52. *People v. Scott*, 53 Cal. 2d 558 (1960)
53. *People v. Wade*, 53 Cal. 2d 322 (1959)
54. *People v. Hooten*, 53 Cal. 2d 85 (1959)
55. *People v. Hamilton*, 52 Cal. 2d 636 (1959)
56. *People v. Jones*, 52 Cal. 2d 636 (1959)
57. *People v. Galtman*, 52 Cal. 2d 283 (1959)
58. *People v. Nash*, 52 Cal. 2d 36 (1959)
59. *People v. Linden*, 52 Cal. 2d 1 (1959)
60. *People v. Duncan*, 51 Cal. 2d 523 (1959)
61. *People v. Feldkamp*, 51 Cal. 2d 237 (1958)
62. *People v. Ward*, 50 Cal. 2d 702 (1958)
63. *People v. Bashor*, 48 Cal. 2d 763 (1957)
64. *People v. Dement*, 48 Cal. 2d 600 (1957)
65. *People v. Tipton*, 48 Cal. 2d 389 (1957)
66. *People v. Hardenbrook*, 48 Cal. 2d 345 (1957)
67. *People v. Cheary*, 48 Cal. 2d 301 (1957)

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[1]Murder for hire.

68. *People v. Johnston*, 48 Cal. 2d 78 (1957)
69. *People v. Riser*, 47 Cal. 2d 566 (1956)
70. *People v. Abbott*, 47 Cal. 2d 363 (1956)
71. *People v. Reese*, 47 Cal. 2d 112 (1956)
72. *People v. Morlock*, 46 Cal. 2d 141 (1956)
73. *People v. Caritativo*, 46 Cal. 2d 68 (1956)
74. *People v. Jordan*, 45 Cal. 2d 697 (1955)
75. *People v. Pierce*, 45 Cal. 2d 697 (1955)
76. *People v. Thomas*, 45 Cal. 2d 433 (1955)
77. *People v. Berry*, 44 Cal. 2d 426 (1955)
78. *People v. Cavanaugh*, 44 Cal. 2d 252 (1955)
79. *People v. Zilbaner*, 44 Cal. 2d 43 (1955)
80. *People v. Burwell*, 44 Cal. 2d 16 (1955)
81. *People v. Caldwell*, 43 Cal. 2d 864 (1955)
82. *People v. Simpson*, 43 Cal. 2d 553 (1954)[2]
83. *People v. Graham*, 43 Cal. 2d 319 (1954)
84. *People v. Santo*, 43 Cal. 2d 319 (1954)
85. *People v. Baldwin*, 42 Cal. 2d 858 (1954)
86. *People v. Byrd*, 42 Cal. 2d 200 (1954)
87. *People v. Rupp*, 41 Cal. 2d 371 (1953)

COLORADO

88. *People v. Monge*, Executed June 7, 1967 (Did not appeal, but is reliably reported to have personally committed the homicide for which he was executed. See Burton, Pileup on Death Row 68-69 (1963)
89. *People v. Bizup*, 150 Colo. 5 (1962)
90. *People v. Hammil*, 145 Colo. 577 (1961)
91. *People v. Wooley*, 145 Colo. 577 (1961)
92. *People v. Early*, 142 Colo. 462 (1960)

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[2]Father had his children murder his wife.

93. *People v. Leick*, 140 Colo. 564 (1959)
94. *People v. Gilbert*, 134 Colo. 290 (1956)
95. *People v. Martinez*, 134 Colo. 82 (1956)

CONNECTICUT

96. *State v. Davies*, 146 Conn. 137 (1959)
97. *State v. Wojculewicz*, 142 Conn. 676 (1955)
98. *State v. Taborsky*, 142 Conn. 619 (1955)
99. *State v. Malm*, 142 Conn. 113 (1955)
100. *State v. Lorain*, 141 Conn. 694 (1954)
101. *State v. Donahue*, 141 Conn. 656 (1954)

DISTRICT OF COLUMBIA

102. *Carter v. United States*, 223 F.2d 332 D.C. Cir. (1955)

FLORIDA

103. *Spinkellink v. State*, 313 So. 2d 666 (Fla. 1975)
104. *Blake v. State*, 156 So. 2d 511 (Fla. 1963)
105. *Lee v. State*, 141 So. 2d 257 (Fla. 1962)
106. *Dawson v. State*, 139 So. 2d 408 (Fla. 1962)
107. *Hill v. State*, 133 So. 2d 68 (Fla. 1961)
108. *Leach v. State*, 132 So. 2d 329 (Fla. 1961)
109. *Smith v. State*, 132 So. 2d 329 (Fla. 1961)
110. *Johnson v. State*, 130 So. 2d 599 (Fla. 1961)
111. *Jefferson v. State*, 128 So. 2d 132 (Fla. 1961)
112. *Brooks v. State*, 117 So. 482 (Fla. 1960)
113. *Mackiewicz v. State*, 114 So. 2d 684 (Fla. 1959)
114. *Daniels v. State*, 108 So. 3d 755 (Fla. 1959)
115. *Frazier v. State*, 107 So.2d 16 (Fla. 1958)
116. *Withers v. State*, 104 So. 2d 725 (Fla. 1958)
117. *Nelson v. State*, 97 So. 2d 250 (Fla. 1957)
118. *Everett v. State*, 97 So. 2d 241 (Fla. 1957)
119. *Long v. State*, 96 So. 2d 897 (FLa. 1957)

120. *Raulerson v. State*, 93 So. 2d 399 (Fla. 1957)[4]
121. *Rhone v. State*, 93 So. 2d 80 (Fla. 1957)
122. *Ezzell v. State*, 88 So. 2d 280 (Fla. 1956)
123. *LaVoie v. State*, 84 So. 2d 593 (Fla. 1956)[4]
124. *Barwicks v. State*, 82 So. 2d 356 (Fla. 1955)
125. *Ambrister v. State*, 78 So. 2d 876 (FLa. 1955)[4]
126. *Anderson v. State*, 78 So. 2d 876 (Fla. 1955)[4]
127. *Dyer v. State*, 78 So. 2d 402 (Fla. 1955)
128. *Hornbeck v. State*, 77 So. 2d 876 (Fla. 1955)[3]
129. *Gillard v. State*, 73 So. 2d 677 (Fla. 1954)[4]

GEORGIA

130. *Jones v. State*, 219 Ga. 245 (1963)[4]
131. *Pugh v. State*, 219 Ga. 166 (1963)
132. *Chandler v. State*, 219 Ga. 105 (1963)
133. *Dye v. State*, 218 Ga. 330 (1962)
134. *Smith v. State*, 218 Ga. 216 (1962)
135. *Wimis v. State*, 216 Ga. 350 (1960)
136. *Mullins v. State*, 216 Ga. 183 (1960)
137. *Davis v. State*, 215 Ga. 788 (1960)
138. *Albert v. State*, 215 Ga. 564 (1959)
139. *Wilson v. State*, 215 Ga. 446 (1959)
140. *Wilson v. State*, 215 G. 282 (1960)
141. *Hill v. State*, 214 Ga. 794 (1959)
142. *Charlton v. State*, 214 Ga. 778 (1959)
143. *Woods v. State*, 214 Ga. 546 (1958)
144. *Murray v. State*, 214 Ga. 350 (1958)
145. *Adams v. State*, 214 Ga. 131 (1958)
146. *Golden v. State*, 213 Ga. 481 (1957)
147. *Dupree v. State*, 213 Ga. 348 (1957)

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[3]Non-triggerman in felony murder.

[4]No facts given in decisions.

148. *Mullins v. State*, 213 Ga. 331 (1957)
149. *Toler v. State*, 213 Ga. 12 (1957)[5]
150. *Elder v. State*, 212 Ga. 705 (1956)
151. *Styles v. State*, 212 Ga. 698 (1956)
152. *Fields v. State*, 212 Ga. 652 (1956)
153. *Cooper v. State*, 212 Ga. 367 (1956)
154. *Cochran v. State*, 212 Ga. 245 (1956)
155. *Turner v. State*, 212 Ga. 199 (1956)
156. *Philpot v. State*, 212 Ga. 79 (1955)
157. *Domingo v. State*, 211 Ga. 691 (1955)
158. *Hill v. State*, 211 Ga. 683 (1955)
159. *Jackson v. State*, 211 Ga. 490 (1955)
160. *Corbin v. State*, 211 Ga. 400 (1955)
161. *Morgan v. State*, 211 Ga. 172 (1954)
162. *Williams v. State*, 210 Ga. 207 (1953)

IDAHO

163. *State v. Snowden*, 79 Idaho 266, 313 P.2d 706 (1957)

ILLINOIS

164. *People v. Ciucci*, 21 Ill. 2d 81, 171 N.E.2d 24 (1961)
165. *People v. Dukes*, 19 Ill. 2d 532, 169 N.E.2d 84 (1960)
166. *People v. Carpenter*, 11 Ill. 2d 60, 142 N.E.2d 11 (1957)

INDIANA

167. *Judy v. State*, 416 N.E.2d 95 (Ind. 1981)
168. *Kiefer v. State*, 169 N.E.2d 723 (Ind. 1960)

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[5]No facts given in decision.

IOWA

169. *State v. Kelley*, 253 Iowa 1314, 115 N.W.2d 184 (1962)
170. *State v. Brown*, 253 Iowa 658, 113 N.W.2d 286 (1962)

KANSAS

171. *State v. Latham*, 190 Kan. 411, 374 P.2d 788 (1962)
172. *State v. York*, 190 Kan. 411, 375 P.2d 788 (1962)
173. *State v. Hickock*, 188 Kan. 473, 363 P.2d 541 (1961)
174. *State v. Smith*, 188 Kan. 473, 363 P.2d 541 (1961)
175. *State v. Andrews*, 187 Kan. 458, 375 P.2d 739 (1960)

KENTUCKY

176. *Moss v. Commonwealth*, 332 S.W.2d 650 (Ky. 1959)
177. *Bowman v. Commonwealth*, 290 S.W.2d 814 (Ky. 1956)
178. *DeBerry v. Commonwealth*, 289 S.W.2d 495 (Ky. 1956)
179. *Nichols v. Commonwealth*, 283 S.W.2d 184 (Ky. 1955)
180. *Milam v. Commonwealth*, 275 S.W.2d 921 (Ky. 1955)
181. *Merrifield v. Commonwealth*, 268 S.W.2d 405 (Ky. 1954)
182. *Tarrence v. Commonwealth*, 265 S.W.2d 52 (Ky. 1953)
183. *Tarrence v. Commonwealth*, 265 S.W.2d 40 (Ky. 1953)

LOUISIANA

184. *State v. Ferguson*, 240 La. 593, 124 So. 2d 558 (1960)
185. *State v. Faciane*, 233 La. 1028, 99 So. 2d 333 (1957)[6]
186. *State v. McMiller*, 233 La. 1028, 99 So. 2d 333 (1957)[6]
187. *State v. Bailey*, 233 La. 40, 96 So. 2d 34 (1957)
188. *State v. Sheffield*, 232 La. 53, 93 So. 2d 691 (1957)
189. *State v. Bush*, 230 La. 181, 88 So. 2d 19 (1956)[7]
190. *State v. Washington*, 230 La. 181, 88 So. 2d 19 (1956)[7]
191. *State v. Chinn*, 229 La. 984, 87 So. 2d 315 (1955)
192. *State v. Brazile*, 226 La. 254, 75 So. 2d 856; 229 La. 600, 86 So. 2d 208 (1956)[7]

MARYLAND

193. *State v. Lipscomb*, 223 Md. 599, 165 A.2d 918 (1960)
194. *State v. Shockley*, 218 Md. 491, 148 A.2d 371 (1959)
195. *State v. Kier*, 216 Md. 513, 140 A.2d 896 (1958)
196. *State v. Daniels*, 213 Md. 90, 131 A.2d 267 (1957)
197. *State v. Thomas*, 206 Md. 575, 112 A.2d 913 (1955)

MISSISSIPPI

198. *Jackson v. State*, 249 Miss. 202, 161 So. 2d 660 (1964)
199. *Anderson v. State*, 246 Miss. 821, 152 So. 2d 702 (1963)
200. *Slyter v. State*, 246 Miss. 402, 149 So. 2d 489 (1963)
201. *Simmons v. State*, 241 Miss. 481, 130 So. 2d 860 (1961)
202. *Stokes v. State*, 240 Miss. 453, 128 So. 2d 341 (1961)

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[6]McMiller was involved along with 2 others and Faclane in a robbery of a store. Faclane shot the storekeeper's son. The opinion does not detail McMiller's degree of participation.

[7]No facts given in decisions.

203. *Goldsby v. State*, 240 Miss. 647, 123 So. 2d 429 (1960)
204. *Dean v. State*, 234 Miss. 376, 106 So. 2d 501 (1958)
205. *Wetzel v. State*, 232 Miss. 366, 98 So. 2d 767 (1957)
206. *Thompson v. State*, 231 Miss. 624, 97 So. 2d 227 (1957)
207. *Jackson v. State*, 228 Miss. 604, 89 So. 2d 626 (1956)
208. *Jones v. State*, 228 Miss. 458, 88 So. 2d 91 (1956)
209. *Townsel v. State*, 228 Miss. 110, 87 So. 2d 481 (1956)
210. *Sorber v. Wiggins*, 226 Miss. 693, 85 So. 2d 479 (1956)
211. *Russell v. State*, 226 Miss. 885, 85 So. 2d 585 (1956)
212. *Keeler v. State*, 226 Miss. 199, 84 So. 2d 153 (1955)
213. *Wiggins v. State*, 224 Miss. 414, 80 So. 2d 17 (1955)
214. *Gilmore v. State*, 225 Miss. 173, 82 So. 2d 838 (1955)
215. *LaFontaine v. State*, 223 Miss 562, 78 So. 2d 600 (1955)
216. *McNair v. State*, 223 Miss. 83, 77 So. 2d 306 (1955)
217. *Gallego v. State*, 222 Miss. 719, 77 So. 2d 321 (1955)
218. *Lewis v. State*, 222 Miss. 140, 75 So. 2d 448 (1954)

MISSOURI

219. *State v. Anderson*, 386 S.W.2d 225 (Mo. 1963)
220. *State v. Tucker*, 362 S.W.2d 509 (Mo. 1962)
221. *State v. Moore*, 303 S.W.2d 60 (Mo. 1957)
222. *State v. Booker*, 276 S.W.2d 104 (Mo. 1955)

NEBRASKA

223. *Starkweather v. State*, 167 Neb. 477, 93 N.W.2d 619 (1958)

NEVADA

224. *Bishop v. State*, 597 P.2d 273 (Nev. 1979)
225. *Archibald v. State*, 362 P.2d 721 (Nev. 1961)
226. *Steward v. State*, 346 P.2d 1083 (Nev. 1959)

NEW JERSEY

227. *State v. Hudson*, 38 N.J. 364, 185 A.2d 1 (1962)
228. *State v. Ernst*, 32 N.J. 567, 161 A.2d 511 (1960)
229. *State v. Sturdivant*, 31 N.J. 165, 155 A.2d 771 (1959)
230. *State v. Stokes*, 19 N.J. 59, 115 A.2d 62 (1955)
231. *State v. A. Wise*, 19 N.J. 59, 115 A.2d 62 (1955)
232. *State v. H. Wise*, 19 N.J. 59, 115 A.2d 62 (1955)
233. *State v. Cruz*, 17 N.J. 572, 112 A.2d 247 (1955)[8]
234. *State v. Rios*, 17 N.J. 572, 112 A.2d 247 (1955)
235. *State v. Rodriguez*, 17 N.J. 572, 112 A.2d 247 (1955)[8]
236. *State v. Tune*, 17 N.J. 100, 110 A.2d 90 (1954)
237. *State v. Roscus*, 16 N.J. 415, 109 A.2d 1 (1954)
238. *State v. Monohan*, 16 N.J. 83, 106 A.2d 287 (1954)

NEW MEXICO

239. *State v. Nelson*, 65 N.M. 403, 338 P.2d 301 (1959)
240. *State v. Upton*, 60 N.M. 205, 290 P.2d 440 (1955)

NEW YORK

241. *People v. Mays*, 13 N.Y.2d 784, 192 N.E.2d 173 (1963)
242. *People v. Wood*, 12 N.Y.2d 69, 187 N.E.2d 116 (1962)
243. *People v. Miller*, 6 N.Y.2d 154, 175 N.E.2d 547 (1961)
244. *People v. Downs*, 8 N.Y.2d 860, 168 N.E.2d 710 (1960)
245. *People v. Philips*, 8 N.Y.2d 850, 203 N.Y.S.2d 900 (1960)

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[8]Non-triggermen in felony murder.

246. *People v. Chapman*, 8 N.Y.2d 809, 202 N.Y.S.2d 25 (1960)*
247. *People v. Flakes*, 7 N.Y.2d 1038, 200 N.Y.S.2d 422 (1960)*
248. *People v. Green*, 7 N.Y.2d 1038, 200 N.Y.S.2d 422 (1960)*
249. *People v. Vargas*, 7 N.Y.2d 555, 200 N.Y.S.2d 29 (1960)
250. *People v. Mason*, 7 N.Y.2d 891, 197 N.Y.S.2d 200 (1960)
251. *People v. Keith*, 6 N.Y.2d 880, 188 N.Y.S.2d 998 (1959)
252. *People v. Dawkins*, 6 N.Y.2d 814, 188 N.Y.S.2d 201 (1959)*
253. *People v. Richardson*, 5 N.Y.2d 767, 179 N.Y.S.2d 861 (1958)*
254. *People v. Dan*, 4 N.Y.2d 934, 175 N.Y.S.2d 174 (1958)*
255. *People v. LaMarca*, 4 N.Y.2d 923, 175 N.Y.S.2d 167 (1958)
256. *People v. Eckwerth*, 4 N.Y.2d 923, 175 N.Y.S.2d 164 (1958)
257. *People v. Turner*, 4 N.Y.2d 731, 171 N.Y.S.2d 119 (1958)*
258. *People v. Burke*, 3 N.Y.2d 985, 169 N.Y.S.2d 745 (1957)*
259. *People v. Santiago*, 3 N.Y.2d 809, 166 N.Y.S.2d 9 (1957)*
260. *People v. Taylor*, 2 N.Y.2d 1009, 163 N.Y.S.2d 617 (1957)*
261. *People v. Browne*, 2 N.Y.2d 842, 159 N.Y.S.2d 981 (1957)*

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*In the cases marked by an asterisk, the reported opinion does not describe the facts of the case; the facts were obtained from the appellate briefs.

262. *People v. Salemi*, 2 N.Y.2d 159, 159 N.Y.S.2d 972 (1957)
263. *People v. Reade*, 1 N.Y.2d 959, 154 N.Y.S.2d 27 (1956)
264. *People v. Edwards*, 1 N.Y.2d 830, 153 N.Y.S.2d 213 (1956)
265. *People v. Newman*, I N.Y.2d 666, 150 N.Y.S.2d 196 (1956)*
266. *People v. Byers*, 309 N.Y. 908, 131 N.E.2d 580 (1955)*
267. *People v. Roye*, 309 N.Y. 903, 131 N.E.2d 578 (1955)*
268. *People v. Roche*, 309 N.Y. 678, 128 N.E.2d 323 (1955)*
269. *People v. Nichols*, 308 N.Y. 1038, 127 N.E.2d 869 (1955)*
270. *People v. Reed*, 308 N.Y. 1038, 127 N.E.2d 869 (1955)*
271. *People v. Rosario*, 308 N.Y. 723, 124 N.E.2d 337 (1954)
272. *People v. Wissner*, 303 N.Y. 856, 104 N.E.2d 917 (1952)*
273. *People v. Cooper*, 303 N.Y. 856, 104 N.E.2d 917 (1952)*
274. *People v. Stein*, 303 N.Y. 856, 104 N.E.2d 917 (1952)[9]

NORTH CAROLINA

275. *State v. Boykin*, 255 N.C. 432 (1961)
276. *State v. Bumon*, 247 N.C. 510 (1958)
277. *State v. Conner*, 244 N.C. 109 (1956)
278. *State v. Scales*, 242 N.C. 400 (1955)

*In the cases marked by an asterisk, the reported opinion does not describe the facts of the case; the facts were obtained from the appellate briefs.

[9]Non-triggermen in felony murder.

OHIO

279. *State v. Griffin,* 180 N.E.2d 924 (Ohio 1962)
280. *State v. Fenton,* 179 N.E.2d 60 (Ohio 1961)
281. *State v. Cosby,* 110 Ohio App. 222, 162 N.E.2d 126 (1959)
282. *State v. Byomin,* 106 Ohio App. 393, 154 N.E.2d 823 (1958)
283. *State v. Tannyhill,* 101 Ohio App. 466, 140 N.E.2d 332 (1956)
284. *State v. Allen,* 133 N.E.2d 167 (1956)

OKLAHOMA

285. *French v. State,* 416 P.2d 171 (1966)
286. *Dare v. State,* 378 P.2d 339 (1963)
287. *Doggett v. State,* 371 P.2d 523 (1962)
288. *Young v. State,* 357 P.2d 562 (1960)
289. *Spence v. State,* 353 P.2d 1114 (1959)
290. *Loel v. State,* 300 P.2d 1013 (1956)
291. *Hendricks v. State,* 296 P.2d 205 (1956)
292. *Fairris v. State,* 287 P.2d 708 (1955)

OREGON

293. *State v. McGahney,* 230 Or. 643, 371 P.2d 669 (1962)

PENNSYLVANIA

294. *Commonwealth v. Smith,* 405 Pa. 456, 176 A.2d 619 (1962)
295. *Commonwealth v. Schuck,* 401 Pa. 222, 164 A.2d 13 (1960)
296. *Commonwealth v. McCoy,* 401 Pa. 100, 162 A.2d 636 (1960)
297. *Commonwealth v. Cater,* Pa., 152 A.2d 259 (1959)
298. *Commonwealth v. Graves,* 394 Pa. 429, 147 A.2d 416 (1959)

299. *Commonwealth v. Thompson*, 389 Pa. 382, 133 A.2d 207 (1957)
300. *Commonwealth v. Cole*, 384 Pa. 40, 119 A.2d 253 (1956)
301. *Commonwealth v. Gossand*, 383 Pa. 239, 117 A.2d 902; 123 A.2d 258 (1956)
302. *Commonwealth v. Wable*, 382 Pa. 80, 114 A.2d 334 (1955)
303. *Commonwealth v. Capps*, 382 Pa. 72, 114 A.2d 338 (1955)
304. *Commonwealth v. Thompson*, 381 Pa. 299, 113 A.2d 274 (1955)
305. *Commonwealth v. Lance*, 381 Pa. 293, 113 A.2d 290 (1955)
306. *Commonwealth v. Edwards*, 380 Pa. 52, 110 A.2d 216 (1954)

SOUTH CAROLINA

307. *State v. Young*, 119 S.E.2d 504 (S.C. 1961)
308. *State v. Britt*, 117 S.E.2d 379 (S.C. 1960); 111 S.E.2d 669 (S.C. 1959)[10]
309. *State v. Westbury*, 117 S.E.2d 379 (S.C. 1960); 111 S.E.2d (S.C. 1959)[10]
310. *State v. Bullock*, 111 S.E.2d 657 (S.C. 1959)
311. *State v. Byrd*, 93 S.E.2d 900 (S.C. 1956)
312. *State v. Boone*, 90 S.E.2d 640 (S.C. 1955)
313. *State v. Wright*, 90 S.E.2d 492 (S.C. 1955)
314. *State v. Chasteen*, 88 S.E.2d 880 (S.C. 1955)
315. *State v. Fuller*, 87 S.E.2d 287 (S.C. 1955)

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[10]It is unclear from the reported opinions as to which of these co-defendants shot the victim.

TENNESSEE

316. *Gibbs v. State*, 300 S.W.2d 890 (Tenn. 1957)
317. *Kirkendoll v. State*, 281 S.W.2d 243 (Tenn. 1955)
318. *Sullins v. State*, 281 S.W.2d 243 (Tenn. 1955)[11]
319. *Voss v. State*, 278 S.W.2d 667 (Tenn. 1955)

TEXAS

320. *Johnson v. State*, 378 S.W.2d 76 (Tex. Cr. App. 1964)
321. *Bradford v. State*, 372 S.W2d 336 (Tex. Cr. App. 1963)
322. *Lavan v. State*, 363 S.W.2d 139 (Tex. Cr. App. 1963)
323. *Stein v. State*, 172 Tex. Crim. 248, 355 S.W.2d 723 (1962)
324. *Mosley v. State*, 172 Tex. Crim. 117, 354 S.W.2d 391 (1962)
325. *Wilson v. State*, 171 Tex. Crim. 573, 352 S.W.2d 114 (1961)
326. *Luton v. State*, 171 Tex. Crim. 441, 350 S.W.2d 853 (1961)
327. *Wiley v. State*, 171 Tex. Crim. 366, 350 S.W.2d 22 (1961)[12]
328. *Leath v. State*, 171 Tex. Crim. 209, 346 S.W.2d 346 (1961)
329. *Johnson v. State*, 169 Tex. Crim. 612, 336 S.W.2d 175 (1960)
330. *Stickney v. State*, 169 Tex. Crim. 533, 336 S.W.2d 133 (1960)

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[11]Non-triggerman in felony murder.

[12]While it is unclear from the reported decision whether the victim was killed by Wiley or by co-defendant Mc.Dade or both, Wiley was executed whereas McDade was not.

331. *Williams v. State*, 169 Tex. Crim. 370, 333 S.W.2d 846 (1960)
332. *Philpot v. State*, 169 Tex. Crim. 91, 332 S.W.2d 323 (1960)
333. *Moon v. State*, 169 Tex. Crim. 14, 331 S.W.2d 312 (1959)
334. *Moses v. State*, 168 Tex. Crim. 206, 328 S.W.2d 885 (1959)
335. *Smith v. State*, 168 Tex. Crim. 102, 323 S.W.2d 443 (1959)
336. *Slater v. State*, 166 Tex. Crim. 66, 317 S.W.2d 203 (1958)
337. *White v. State*, 165 Tex. Crim. 339, 306 S.W.2d 903 (1957)[13]
338. *Shaver v. State*, 165 Tex. Crim. 276, 306 S.W.2d 128 (1957)
339. *Lamkin v. State*, 165 Tex. Crim. 11, 301 S.W.2d 922 (1957)
340. *Hall v. State*, 164 Tex. Crim. 573, 301 S.W.2d 161 (1957)
341. *McGowen v. State*, 163 Tex. Crim. 587, 290 S.W.2d 521 (1956)
342. *Webb v. State*, 163 Tex. Crim. 392, 291 S.W.2d 331 (1956)
343. *Bingham v. State*, 163 Tex. Crim. 353, 290 S.W.2d 915 (1956)
344. *Washington v. State*, 162 Tex. Crim. 479, 286 S.W.2d 629 (1956)
345. *Walker v. State*, 162 Tex. Crim. 408, 286 S.W.2d 144 (1956)

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[13]No facts stated as to which of two co-defendants killed the victim.

346. *Farrar v. State,* 162 Tex. Crim. 136, 277 S.W.2d 114 (1955)
347. *Ellisor v. State,* 162 Tex. Crim. 117, 282 S.W.2d 393 (1955)
348. *Meyer v. State,* 160 Tex. Crim. 521, 276 S.W.2d 286 (1954)
349. *Brown v. State,* 160 Tex. Crim. 150, 267 S.W.2d 819 (1954)

UTAH

350. *State v. Gilmore,* (Cr. No. 6405, 4th Jud. Dist., 1976)
351. *State v. Rodgers,* 329 P.2d 1075 (Utah 1958)
352. *State v. Kirkham,* 7 Utah 2d 108, 319 P.2d 859 (1958)
353. *State v. Neal,* 123 Utah 93, 254 P.2d 1053 (1953)
354. *State v. Braasch,* 119 Utah 450, 229 P.2d 289 (1951)
355. *State v. Sullivan,* 119 Utah 450, 229 P.2d 289 (1951)

VIRGINIA

356. *Fuller v. Commonwealth,* 113 S.E.2d 667 (Va. 1960)
357. *Lucas v. Commonwealth,* 112 S.E.2d 915 (Va. 1960)

WASHINGTON

358. *State v. Self,* 59 Wash. 2d 62, 366 P.2d 193 (1961)
359. *State v. Collins,* 50 Wash. 2d 740, 314 P.2d 660 (1957)
360. *State v. Farley,* 48 Wash. 2d 11, 290 P.2d 987 (1955)

WEST VIRGINIA

361. *State v. Bruner,* 143 W. Va. 755, 105 S.E.2d 140 (1958)

WYOMING

362. *Pixley v. State,* 406 P.2d 662 (Wyo. 1965)

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No. 81-5321

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1981

EARL ENMUND,

Petitioner,

against

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT

JIM SMITH
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QUESTIONS PRESENTED

1. WHETHER THE DEATH PENALTY CAN EVER BE CONSTITUTIONALLY APPROPRIATE FOR A DEFENDANT CONVICTED OF FIRST DEGREE MURDER STEMMING FROM HIS EXTENSIVE PARTICIPATION IN A DEADLY FELONY INVOLVING FIREARMS, WHEN THE DEFENDANT, ALTHOUGH PRESENT IN THE VICINITY OF THE KILLINGS, DID NOT PERSONALLY COMMIT THE MURDERS, AND THERE WAS AN ABSENCE OF PROOF THAT HE INTENDED THE DEATHS TO OCCUR?

2. WHETHER PETITIONER'S DEATH SENTENCES WERE APPROPRIATE CONSIDERING HIS HIGH DEGREE OF INVOLVEMENT IN THE CRIMES, THE FORSEEABILITY THAT DEATHS WOULD OCCUR DURING A ROBBERY INVOLVING THE USE OF FIREARMS, AND THE FACT THAT PETITIONER NEITHER INTRODUCED NOR PROFFERED ANY EVIDENCE IN MITIGATION?

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STATEMENT OF THE CASE

Petitioner's statement of the case omits material facts, is not written in a light most favorable to sustain the rulings of the Florida courts, and is unacceptable.

Petitioner was convicted of two counts of first degree murder and one count of robbery in the Circuit Court of Hardee County, Florida (R 1647). After a sentencing hearing in which Petitioner neither introduced nor proffered any evience (R 1677), the jury recommended that sentences of death be imposed for the two first degree murder convictions (R 1691). Petitioner's co-defendant, Sampson Armstrong, was also convicted of two accounts of first degree murder, and the jury recommended two death sentences for him also. The trial court then found

that the aggravating circumstances outweighed the mitigating circumstances and sentenced Petitioner to death on both first degree murder counts (R 1700, 1701). He received a life sentence for the robbery conviction.

The murders and robbery arose out of an incident which occurred on April 1, 1975. Sometime in March, 1975, Petitioner and two other individuals had been present at the victims' home in order to buy a calf (R 997). One of the victims, Thomas Kersey, exhibited a large roll of cash, and Petitioner later admitted that the amount of cash had been a topic of discussion that evening (R 1509).

Early on the morning of the murders, Petitioner was seen in a car near the scene of the murders (R 1330-1303). An accquaintance of co-defendant Armstrong

testified that on the day of the murders Armstrong had told him that he, Petitioner, and Armstrong's wife had robbed and killed an elderly couple (R 1345-1353). Armstrong and his wife had approached the old couple's farm house door ostensibly for the purpose of asking for water for an overheated car. However, Armstrong grabbed victim Thomas Kersey at which time Mrs. Kersey opened fire and shot Jeannette Armstrong. A gun battle ensued, and both Mr. Kersey and his wife were murdered. Shortly thereafter, Petitioner was seen driving the same automobile which had been seen outside the victims' residence by another witness. In the car with him were his common law wife and two unidentified persons, one of whom was lying down in the back seat of the car (R 1303).

Petitioner's common law wife, Ida Jean Shaw, testified that on April 2, 1975, she had been in an automobile with both Armstrong and Enmund and that Armstrong had given her two hundred dollars (R 1195). She also testified that on the day of the murders she asked Enmund why he had done it, and he replied that he had seen the man with the money when he had bought the calf (R 1205, 1206). During the same conversation, Armstrong stated that he had made sure that the people were dead (R 1207, 1208).

Based on these facts, the Supreme Court of Florida upheld the trial court's findings that victim Kersey had a reputation for carrying large sums of money on his person, that Petitioner had actually seen Mr. Kersey with the money, and that Enmund planned and participated in the

robbery which resulted in the murders. Also upheld was the trial court's finding that Enmund had helped to cover up the crime by directing that Ida Jean Shaw dispose of the murder weapons (R 1201).

The Florida Supreme Court's more detailed statement of facts can be found at Enmund v. State, 399 So.2d 1362, 1363-1367 (Fla. 1981)(J.A. 35-42).

SUMMARY OF ARGUMENT

I.

The Constitution does not require proof of intent before a defendant can be found criminally responsible. Rather, the determination of criminal responsibility has traditionally been left to the various states, whose legislative determinations are afforded great deference and will not be disturbed absent a showing of irrationality.

When determining whether a legislative judgment that a sentence is appropriate for a particular crime is rational, this Court has traditionally refrained from drawing "bright lines." Judicially created, inflexible rules are especially inappropriate in criminal cases because, as this Court has traditionally held, a particular sentence

must be tailored to meet the peculiar facts and circumstances of the crime as well as the character of the individual perpetrator.

The Florida Legislature did not act arbitrarily or irrationally when it based criminal responsibility upon concepts of foreseeability. The Florida Legislature rationally concluded that homicides were more likely to occur during the commission of certain potentially dangerous felonies, and it provided that its most serious sanction should be imposed in the most extreme cases. However, in Florida, just because a death sentence is possible, it is not automatic. The sentencing authority's discretion is guided and channeled, Proffitt v. Florida, 428 U.S. 424 (1976), and the sentencing authority is required to weigh all relevant

mitigating evidence against the applicability of specified aggravating factors. In that regard, Florida has a statutory mitigating circumstance which requires that the sentencing authority consider the extent of an accomplice's participation in the capital felony.

The Florida Legislature also rationally concluded that the threat of capital punishment would deter potential murder-felons from committing the underlying felonies which often result in death. Gregg v. Georgia, 428 U.S. 153 (1976). Moreover, Florida's legislative determination that it should be possible to impose the ultimate penalty upon a defendant who was convicted of recklessly engaging in foreseeably deadly conduct is also rational. Any judicial conclusion to the contrary would threaten the lives

of numerous innocent victims who might otherwise be murdered if their assailants or robbers knew they had nothing to lose by eliminating witnesses to the underlying felony. A bright line is simply not appropriate.

II.

Death is the appropriate sentence for Petitioner because of his extensive involvement in the underlying felony which resulted in the murders of two innocent, elderly people. While the fact that it was not proved that Petitioner intended the murders to occur might be relevant in mitigation, this doesn't mean that either the trial court or the jury had to find that Petitioner was a minor accomplice. In fact, the sentencing authority found to the contrary that Petitioner's participation was major --

he planned the robbery, procured his accomplices, participated in the robbery, was present in the getaway car near the actual murders, and helped to cover up the crime.

Finally, although Lockett v. Ohio, 438 U.S. 586 (1878), requires a sentencing authority to consider all relevant mitigating evidence which was proffered or introduced, Petitioner presented absolutely no mitigating evidence during the sentencing phase of his trial. Therefore, because Petitioner has not even challenged the applicability of the two valid aggravating circumstances found by the Supreme Court of Florida, the aggravating circumstances indisputably outweigh the total absence of evidence in mitigation. Petitioner's death sentences should not be disturbed.

ARGUMENT

I.

THE EIGHTH AMENDMENT DOES NOT REQUIRE PROOF OF MENS REA AND/OR INTENT BEFORE A DEFENDANT CAN BE FOUND CRIMINALLY RESPONSIBLE.

The Petitioner's major theme is that his death sentences are disproportionate to his criminal conduct because there was no proof that he intended deaths to occur. Therefore, while paradoxically conceding that the State of Florida can hold him criminally responsible and thus guilty of first degree murder,[1] Petitioner maintains that a death sentence cannot be imposed in his case. However, Petitioner's argument must fail because the Eighth Amendment does not require

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[1]Section 777.011, Fla. Stat., allows an aider and abettor to be convicted and punished as a principal. (J.A. 47).

proof of either mens rea or actual intent before a state can find an offender criminally responsible and eligible for the punishment prescribed by law.

In Powell v. Texas, 392 U.S. 514, 535 (1968), the Court announced that it had never stated that the Constitution required a finding of mens rea before criminal responsibility could be found:

> We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his anti-social deeds. [footnote omitted] The doctrines of actus reus, mens rea, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the states.

Id. at 392 U.S. 535, 536 (Emphasis added).

In a footnote in his concurring opinion in Powell, Justice White honed in on the crucial analysis which must be examined when determining criminal responsibility -- "The proper subject of inquiry is whether volitional acts brought about the 'condition' and whether those acts are sufficiently proximate to the 'condition' for it to be permissible to impose penal sanctions on the 'condition.'" Id. at 392 U.S. 551, n.2. Stated in terms of the issues presented in Petitioner's case, Justice White's comments would be whether the defendant's volitional acts brought about the murders and whether the defendant's acts were sufficiently proximate to allow Florida to impose penal sanctions.

More recently, while concurring in Lockett v. Ohio, 438 U.S. 586, 614 (1978), Justice Blackmun recognized that a requirement of proof of an actual intent to kill before a defendant could be capitally sentenced would impose on the States an artificially defined mens rea. In language[2] consistent with Powell v. Texas, supra, he perceived the myriad of difficulties which would be presented by focusing on "intent," as if that were the only acceptable measure

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[2]This correct analysis is uniquely inconsistent with any notion of "bright lines" in the determination of the issue of life or death. The relevant considerations cannot be reduced to such a simplistic analysis. Justice Blackmun concurred in the judgment of the Court because under the Ohio statute, unlike Florida's, the sentencer was unable to consider "the degree of the defendant's [non-triggerman] participation in the acts leading to the homicide and the character of the defendant's mens rea." Id. at 438 U.S. 616.

of criminal responsibility. Also, he recognized that proof of mens rea would not be a functional method for determining culpability for eighth amendment purposes, because culpability involved a mixture of action, inaction, and degrees of mens rea:

> 2. I do not find entirely convincing the disproportionality rule embraced by my Brother White. The rule that a defendant must have had actual intent to kill, in order to be capitally sentenced, does not explain why such intent is the sole criterion of culpability for Eighth Amendment purposes. What if a defendant personally commits the act proximately causing death by pointing a loaded gun at the robbery victim, verbally threatens to use fatal force, admittedly does not intend to cause a death, yet knowingly creates a high probability that the gun will discharge accidentally?

What if a robbery participant, in order to avoid capture or even for wanton sport, personally and deliberately uses grave physical force with conscious intent to inflict serious bodily harm, but not to kill, and a death results? May we as judges say that for Eighth Amendment purposes the absence of a "conscious purpose of producing death," post, at 628, 57 L Ed 2d, at 1004, transforms the culpability of those defendants' actions?

Applying a requirement of actual intent to kill to defendants not immediately involved in the physical act causing death, moreover, would run aground on intricate definitional problems attending a felony murder. What intention may a State attribute to a robbery participant who sits in the getaway car, knows that a loaded gun will be brandished by his companion in the robbery inside the store, is willing to have the gun fired if necessary to make an escape but not to accomplish the robbery, when the victim is shot by the companion even

though not necessary for escape? What if the unarmed participant stands immediately inside the store as a lookout, intends that a loaded gun merely be brandished, but never bothered to discuss with the triggerman what limitations were appropriate for the firing of the gun? What if the same lookout personally intended that the gun never be fired, but, after his companion fires a fatal shot to prevent the victim from sounding an alarm, approves and takes off?

The requirement of the actual intent to kill in order to inflict the death penalty would require this Court to impose upon the States an elaborate "constitutionalized" definition of the requisite mens rea, involving myriad problems of line drawing that normally are left to jury discretion but that, in disproportionality analysis, have to be decided as issues of law, and interfering with the substantive categories of the States' criminal law. And such a rule, even if workable, is an incomplete method of ascertaining culpability for

> Eighth Amendment purposes, which necessarily is a more subtle mixture of action, inaction, and degrees of mens rea.
>
> Finally, I must question the data relied upon by my Brother White in concluding, post, at 624, 57 L Ed 2d, at 1002, that only "extremely rare[ly]" had the death penalty been used when a defendant did not specifically intend the death of the victim. The representation made by petitioner Lockett, even if accepted uncritically, was merely that, of 363 reported cases involving executions from 1954 to 1976, in 347 the defendant "personally committed a homicidal assault"-not that the defendant had actual intention to kill. App to Brief for Petitioner 1b. Of contemporary death penalty statutes, my Brother White concedes that approximately half permit the execution of persons who did not actually intend to cause death. (Emphasis added).

Lockett, supra at 438 U.S. 614, 615. Justice Blackmun's observations illustrate the ramifications and irrational results of Petitioner's bright line

theory predicated solely on intent -- and his comments effectively show why a focus on actual intent is patently unacceptable as the sole measurement of criminal responsibility.

Justice Rehnquist, dissenting in part, said it more directly:

> I finally reject the proposition urged by my Brother White in his separate opinion, which the plurality finds it unnecessary to reach. That claim is that the death penalty, as applied to one who participated in this murder as Lockett did, is "disproportionate" and therefore violative of the Eighth and Fourteenth Amendments. I know of no principle embodied in those Amendments, other than perhaps one's personal notion of what is a fitting punishment for a crime, which would allow this Court to hold the death penalty imposed upon her unconstitutional because under the judge's charge to the jury the latter

> were not required to find that she intended to cause the death of her victim. As my Brother White concedes, approximately half of the States "have not legislatively foreclosed the possibility of imposing the death penalty upon those who do not intend to cause death." Ante, at 625, 57 L.Ed.2d, at 1002. Centuries of common law doctrine establishing the felony-murder doctrine, dealing with the relationship between aiders and abettors and principals, would have to be rejected to adopt this view. Just as surely as many thoughtful moralists and penologists would reject the Biblical notion of "an eye for an eye, a tooth for a tooth," as a guide for minimum sentencing, there is nothing in the prohibition against cruel and unusual punishments contained in the Eighth Amendment which sets that injunction as a limitation on the maximum sentence which society may impose.

Id. at 438 U.S. 635, 636.

Justice Rehnquist's reference to Justice White's separate opinion in Lockett concerned the question of whether

a mens rea or actual intent to kill was necessary before a death sentence could be imposed. Justice White's position in Lockett is particularly troublesome to Respondent because of his position in Woodson v. North Carolina, 428 U.S. 280 (1976). In that case, defendant Woodson, like Petitioner, was capitally convicted on a felony murder theory even though he was not personally present in the store where the murder occurred, did not pull the trigger, acted only as a lookout outside the door, and there was an absence of proof that he intended anyone to die. In a dissenting opinion, Justice White stated that he would uphold Woodson's first degree murder conviction and resulting mandatory death sentence, thus implicitly approving a death sentence when intent to kill had not been proven.

Notwithstanding the fact that there is no persuasive or binding legal authority to support Petitioner's argument, the best evidence that the Constitution does not require proof of actual intent to kill before a death sentence can be imposed is the Constitution itself. Article III, Section 3 provides that the Congress shall have the power to decide the punishment for the crime of treason. Congress has provided that a maximum penalty of death can be imposed against one convicted of treason. See 18 U.S.C. §2381.[3] Any judicial

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[3]The Fifth Circuit Court of Appeals has declared the death penalty provision of the Federal Government's murder statute, 18 U.S.C. § 1111, unconstitutional on procedural grounds. United States v. Kaiser, 545 F.2d 467 (5th Cir. 1977). However, legislation is currently pending before Congress to reinstitute the death penalty under federal law. See discussion of S.114, infra.

conclusion that capital punishment is cruel and unusual if it were imposed upon a defendant who was not proven to have intended to kill would purportedly deny the Congress its right and power to determine the punishment for the crime of treason. This power is expressly given to Congress by the Constitution. It should also be noted that treason is a crime which not only does not require intent to kill but also does not require death at all. See 18 U.S.C. § 2381.

Legislation presently pending before Congress "would authorize the imposition of the death penalty for a number of federal felonies in which death results, even if there is no finding that the defendant either committed the crime with the conscious purpose of causing death or participated in the homicidal act."

Capital Punishment: Hearings on S.114 Before the Committee on the Judiciary, 97th Cong., 1st Sess. 25 (1981) (letter stating the views of the Justice Department).

Senate Bill 114 would allow the death penalty in some instances even where death did not occur. For example, Congress is contemplating authorizing death for the attempted assassination of the President. Id. at 59-65 (Memorandum of Justice Department). See also S. Rep. No. 143, 97th Cong., 1st Sess. 5,6,12,13 (1981). Also included in S.114 are the non-homicidal crimes of espionage, 18 U.S.C. §794, and treason, 18 U.S.C. §2381.[4]

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[4]In a footnote, the Justice Department listed the following crimes for which the death penalty could be imposed even if

Consequently, if this Court were to adopt the position urged by Petitioner, in effect, the Court would be declaring S.114 unconstitutional before it was even enacted into law. Considering the far-reaching effect an adverse ruling by this Court would have on the aggregate criminal justice system, and the scope of Congressional consideration in an identical area of endeavor, this Court might wish to consider inviting the Justice Department to air its views of

(continued from previous page) death were an unintentional result: 18 U.S.C. §32 (destruction of aircraft or aircraft facilities); 18 U.S.C. §33 (destruction of motor vehicles or motor vehicle facilities; 18 U.S.C. §351(b) (kidnapping a Member or Member-elect of Congress); 18 U.S.C. §§844(d),(f), and (i) (explosives offenses); 18 U.S.C. §1201 (kidnapping); 18 U.S.C. §1716 (mailing injurious articles); 18 U.S.C. §1751(b) (kidnapping of the President, Vice President, President-elect, or Vice President-elect;

the subject at issue. Much could be learned from the key principals in a critical area of activity.

Petitioner has presented absolutely no authority to support his contention that proof of intent to kill is prerequisite to a capital sentence in a felony murder situation. Moreover, the Court has already upheld a death sentence for a defendant convicted as an accomplice in a felony murder situation where there was no proof of the defendant's intent to cause death. See Stein v. New York, 346 U.S. 156 (1953).

(continued from previous page)18 U.S.C. §1992 (wrecking trains); 18 U.S.C. §2113(e)(bank robbery); 49 U.S.C. 1472(i) or (n) (aircraft piracy). Also death resulting from the attempt or commission of the following crimes would be punishable by death: any rape, arson, burglary or robbery in the special maritime or territorial jurisdiction of the United States (under 18 U.S.C. §1111).

If Petitioner's argument were accepted, there would be no need for the felony murder rule itself, a traditional concept and rule of law which he has not seen fit to challenge (Brief of Petitioner at 19). See also Lockett v.Ohio, supra, at 438 U.S. 602. Thus, since the Constitution does not require an intent to kill before capital punishment can be imposed, the next question which must be examined is Petitioner's contention that this Court should judicially create a rule prohibiting capital punishment in such cases.

A. The Court should refuse to draw a bright line which would usurp the traditional authority of the various state legislatures to determine what punishment is appropriate for a particular crime.

Despite the fact that the Constitution does not require it, Petitioner

has attempted to convince the Court to draw a bright line and rule that the Eighth and Fourteenth Amendments prohibit the States from ever imposing a death sentence upon a defendant convicted of felony murder when the defendant was not the person who committed the murder and where there was an absence of proof that the defendant intended anyone to die. Petitioner asks this Court to go too far!

In fact, the Court has traditionally and consistently rejected the temptation to draw bright lines on constitutional issues. For example, see Rummel v. Estelle, 445 U.S. 263, 285 (1980)(type and severity of punishment of recidivists is a matter within the sound discretion

of the sentencing jurisdiction).[5] In capical cases, the Court has repeatedly applied a policy of approving sentencing procedures which require "particularized consideration of relevant aspects of the the character and record of each convicted defendant before the imposition upon him of a sentence of death." Woodson, supra, at 428 U.S. 303 (1976). See also Lockett, supra at 438 U.S. 602 (1978). Most recently, this concept was reiterated in Eddings v. Oklahoma, ____ U.S. ____, Case No. 80-5727, opinion filed Jan. 19, 1982.

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[5]In a case decided just this term, the Court, in a per curiam opinion, upheld against eighth amendment challenges a state inmate's 40 year sentence for two marijuana offenses. The Court emphasized and reiterated that successful challenges to a particular sentence should be exceedingly rare and that the basic line-drawing process was a legislative rather than judicial function. Hutto v. Davis, ___ U.S. ___, Case No. 81-23, opinion filed Jan. 11, 1982.

The Court should categorically reject any suggestion that a bright line should be drawn now that it suits the argument of those opposed to capital punishment.[6] Indeed, Respondent is somewhat amazed that Petitioner is even attempting to convince this Court to adopt such an inflexible bright line rule -- this is the precise approach that some of the same counsel so strongly and persuasively urged should be rejected in the mandatory death penalty cases, Woodson, supra, and Roberts v. Louisiana, 428 U.S. 325 (1976). Petitioner's "bright line" theory is simple, all right, but that is the very argument

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[6] In fact, four Justices have clearly stated that the Constitution does not prohibit the imposition of a death sentence upon a person under the age of 18 at the time of the crime -- in other words, a bright line is inappropriate. Eddings v. Oklahoma, supra (Burger, C.J., dissenting).

against it. In some matters of government, complexity -- not simplicity -- is desirable. If simplicity were a paramount constitutional value, we would all think better of vigilante lynch law or mandatory death penalty laws. They have the virtue of simplicity, if no other.

Moreover, notwithstanding counsels' inconsistent positions, the drawing of such a simple, though rigid, bright line would forever prevent the rule from being corrected judicially, should the Court subsequently decide such a change were prudent in light of contemporary standards and conditions.

In 1976, during oral argument in Proffitt v. Florida, 428 U.S. 424 (1976), the then Attorney General of Florida advised this Court that the Florida

Legislature rejected the mandatory death penalty approach after Furman because it was socially unacceptable to the people of the State of Florida -- simply for the reason that it was too inflexible and failed to take into consideration the facts and circumstances of the offense and perpetrator. While, Furman created doubt as to what was required and many persons believed that only mandatory statutes would pass constitutional muster, the Florida Legislature made a deliberate decision to enact a good statute, even though risking it might later be determined unconstitutional, rather than a bad statute that at that time most felt would be declared valid.

It was that rational approach which ultimately resulted in the validation of Florida's death penalty statute. The

same legislature decided against limiting its applicability to individuals solely because they were not present during the commission of the crime or did not consciously intend death or because they were of a particular chronological age. Rather, in keeping with Lockett, supra, (before it was decided) those were factors for the sentencer to consider together with the facts and circumstances of the crime and the character of the defendant to determine the appropriate punishment. Eddings v. Oklahoma, supra, They were not irrational in rejecting a "bright line" concept where it would be wholly inappropriate and where it would lead to bizarre results not in keeping with notions of simple fairness and justice.

In any event, when concluding that the death penalty statutes of Georgia, Florida, and Texas did not constitute cruel and unusual punishment, the Court noted that great deference must be given to a legislative determination that a particular sentence was appropriate for a particular crime. Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt, supra; Jurek v. Texas, 428 U.S. 262 (1976). Moreover, the Court also recognized that it cannot require a legislature to select the least severe penalty possible and that "a heavy burden rests on those who would attack the judgment of the representatives of the people." Gregg, supra, at 428 U.S. 175.

This deference to the legislative will of the people of the various states and the Court's exercise of judicial

self-restraint was not a new approach -- as long ago as 1910 the Court recognized that a legislature's assignment of a particular punishment to a particular crime carried with it a presumption of validity:

> However, there is a certain subordination of the judiciary to the legislature. The function of the legislature is primary, its exercise fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of its wisdom or propriety. Weems v. United States, 217 U.S. 349, 379 (1910). (Emphasis supplied)

More recently, in Powell v. Texas, supra, at 392 U.S. 535, 536, the Court noted the importance of the traditional concepts which the common law has utilized to assess an individual's moral accountability for his antisocial deeds. The Court recognized the "constantly

shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philisophical, and medical views of the nature of man" and concluded that "[t]his process of adjustment was always thought to be the province of the States." Id.

Petitioner has made numerous references and analogies to the Court's opinion in Coker v. Georgia, 433 U.S. 584 (1977), most of the time blithely asserting that the only difference between his case and Coker's is that in the rape case "death fortuitously did not result." However, Petitioner's reliance on Coker is misplaced because of the crucial distinction in his case, i.e., in Petitioner's case two deaths did result. Therefore, Petitioner's case is more like

the 1976 death penalty cases which upheld the constitutionality of capital purishment, Gregg, supra, Proffitt, supra, Jurek, supra. The Court's analyses and rationale in those cases should be much more persuasive and effective in analyzing the question now before the Court.[7]

Therefore, because this Court has previously stated that there is no constitutional requirement for a finding of mens rea before a defendant can be found criminally responsible, Powell, supra, and because the Court has

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[7]Interestingly, it is significant to note that even in Coker v. Georgia, supra, Justice Powell, while concurring in the judgment, dissented from the Court's finding of per se unconstitutionality of Georgia's legislative determination that death could be an appropriate sanction for the crime of rape: "Today, in a case that does not require such an expansive pronoucement, the plurality draws a bright line between

traditionally exercised judicial self-restraint and declined from adopting a bright line approach in areas traditionally within the ambit of legislative authority, the next question which must be analyzed is whether Florida's legislative determinations as they pertain in Petitioner's case are rational.

(continued from previous page.) all murder and all rapes -- regardless of the degree of brutality of the rape or the effect on the victim. I dissent because I am not persuaded that such a bright line is appropriate." (Emphasis added). Coker v. Georgia at 433 U.S. 603. Justice Powell has thus rejected a simplistic bright line concept in capital cases. For example, even in Eddings v. Oklahoma, supra, Justice Powell declined to draw a bright line which would prohibit capital punishment for a juvenile, and instead remanded the case for further consideration in light of Lockett.

B. The Florida Legislature did not act arbitrarily or unreasonably when it predicated criminal responsibility upon concepts of foreseeability.

It is no longer disputed that the decision to make possible a capital sentence for a homicide is best left to the various state legislatures. Gregg, supra. In that regard, the Florida Legislature could rationally determine that under some facts and circumstances, capital punishment would be appropriate for a defendant convicted of first degree murder after engaging in such reckless conduct that death was a foreseeable and likely result.

Perhaps Justice Cardozo's comments on responsibility and forseeability, made when he was sitting on the Court of Appeals of New York, should be the

starting point for the Court's analysis:

> The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation, it is risk to another or to others within the range of apprehension. [Citation omitted] This does not mean, of course, that one who launches a destructive force is always relieved of liability, if the force, though known to be destructive, pursues an unexpected path. "It was not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the the ordinarily prudent eye." Munsey v. Webb, 231 U.S. 150, 156 [Citation omitted] Some acts, such as shooting are so imminently dangerous to any one who may come within reach of the missile however unexpectedly, as to impose a duty of prevision not far from that of an insurer. Even today, and much oftener in earlier stages of the law, one acts sometimes at one's peril. [Citations omitted] Under this head, it

> may be, fall certain cases of what is known as transferred intent, an act willfully dangerous to A resulting by misadventure to injury to B. [Citation omitted] These cases aside, wrong is defined in terms of the natural or probable, at least when unintentional. (Emphasis added.)

Palsgraf v. Long Island R. Co., 246 N.Y. 339, 162 N.E. 99, 100-101 (N.Y. 1928).

In terms of the above analysis, Respondent simply does not understand how Petitioner or anyone else can quarrel with the Florida Legislature's conclusion that certain conduct was so foreseeably dangerous that anyone who engaged in such conduct should be eligible for the maximum penalty. A number of United States senators obviously feel such to be the case -- see S.114, discussed previously. The best evidence of the rationality of such a legislative

determination is the fact that not one, but two deaths did occur in Petitioner's case as a direct result of the commission of one of the enumerated potentially deadly felonies. See § 782.04, Fla. Stat.; (J.A.-48).

Moreover, it should be beyond dispute that a homicide is more likely to occur during the commission of a crime in which loaded firearms are used. Besides the fact that sheer common sense dictates that the Florida Legislature's conclusion was rational, weight should be given to the fact that Florida is not the only state which has enacted death penalty legislation applicable to murder-felons or others convicted as accomplices to forseeably dangerous criminal conduct. Although not dispositive of the issue, the fact that at least twenty-six (26)

other states and the federal government have laws similar to Florida weighs heavily in Florida's favor.[8] See Coker v. Georgia, supra, at 433 U.S. 593; Gregg v. Georgia, supra, at 428 U.S. 179-182.

Thus, the Florida Legislature, along with numerous other state legislatures, has rationally concluded that certain

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[8]It should be emphasized that Respondent emphatically disagrees with Petitioner's analysis of other legislative provisions. The following statutes allow an aider and abettor to be convicted of a capital offense, even though intent to murder either has not been or cannot be proved: Ariz. Rev. Stat. Ann. §13-301(2), §13-303A.3., §13-1105; Ark. Stat. Ann. §41-1501(1); (Arkansas allows the affirmative defense that the defendant did not aid in commission of the homicidal act, but the extent of participation would be a question for the trier of fact; see Ark. Stat. Ann. §41-1501(2)); Cal. Penal Code §31, §189; Colo. Rev. Stat. §18-1-603; §18-3-102; (Colorado allows same type of affirmative defenses as Arkansas; see Colo. Rev. Stat. §18-3-102(2)(b));

criminal conduct is so dangerous that death is a foreseeable and likely result of participation in that conduct. This is the touchstone of the felony murder rule itself -- a concept which Petitioner has not seen fit to challenge.

1. Death Sentence Not Automatic

In Proffitt v. Florida, at 428 U.S. 251, the Court noted with approval that Florida's death penalty statute required

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(continued from previous page) Conn. Gen. Stat. §53a-8, §53a-54b(6),(7), & (8); Del. Code Ann. tit. 11, §271; §636; Ga. Code §26-801(b)(3), §26-1101(b); Idaho Code §18-204, §18-4003(d); Ill. Rev. Stat. ch. 38, §5-2, §9-1(a)(3); Ind. Code §35-41-2-4, §35-42-1-1; Ky. Rev. Stat. §502.020, §507.020(b); Miss. Code Ann. §97-1-3, §97-3-19(2)(e); Mont. Rev. Codes Ann. §45-2-302(3), §45-5-102(b); Neb. Rev. Stat. §28-206, §28-303; Nev. Rev. Stat. §195.020, §200.030; N.M. Stat. Ann. §30-1-13, §30-2-1(2); N.C. Gen. Stat

consideration as a statutory mitigating circumstance the extent of a defendant's participation as an accomplice in the capital felony. See § 921.141, Fla. Stat.:

> (d) The Defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor. (Emphasis added).

(continued from previous page) §14-5.2, §14-17; Okla. Stat. Ann. tit. 21, §172, §701.7B; Or. Rev. Stat. §161.155(2)(b), §163.115(1)(b), (Oregon allows same type of affirmative defenses as Arkansas; see Or. Rev. Stat. §163.115(3)); S.C. Code §16-1-40; §16-3-10; S.D. Compiled Laws Ann. §22-3-3, §22-16-4, §22-16-8; Tenn. Code Ann. §§39-109, §39-2407, §39-2402; Texas Penal Code Ann. tit. 2, §7.02(b); tit. 5, §19.03(a); see Wilder v. State, 583 S.W.2d 349 (Tex. Cr. App. 1979); Utah Code Ann. §76-2-202, §76-5-202(1)(d); Vt. Stat. Ann. tit. 13, §4, §2301, §2403; Wash. Rev. Code §9A.08.020, §9A.32.030(1)(c); Wyo. Stat. §6-1-114, §6-4-101;

18 U.S.C. § 2, 49 U.S.C. §1472(i)(1)(B) (aircraft piracy resulting in death); 18 U.S.C. § 794 (espionage).

By requiring consideration of a defendant's involvement in the capital felony, as well as by allowing introduction of any relevant mitigating evidence, (Lockett, supra; Eddings, supra), Florida has insured that the discretion of the sentencing authority is guided and channeled in death penalty cases--in other words a death sentence is not automatic. Thus, a defendant whose participation was in fact minor, unlike Petitioner, would have the benefit of at least one statutory mitigating circumstance.[9] In practice, a death

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[9]The following states also have statutory mitigating circumstances which require consideration of an accomplice's extent of involvement in the capital felony: Ariz. Rev. Stat. Ann. §13-703(g)(3); Ark. Stat. Ann. §41-1304; Cal. Penal Code §190.3(j); Colo. Rev. Stat. §16-11-103-(5)(d); Ill. Rev. Stat.

sentence for an aider and abettor will only be imposed in extreme cases where the defendant's involvement was major--i.e., as in Petitioner's case where he initiated, planned, procured, assisted, and covered up. Because other situations perhaps involving even more reprehensible conduct and an even greater degree of involvement are certain to arise, Respondent reiterates that a bright line is inappropriate.

(continued from previous page) ch. 38, § 9-1(c)(5); Ind. Code § 35-50-2-9(c)(4); Ky. Rev. Stat. §532.025(2)(b)(5); La. Code Crim. Pro. Ann. art. 905.5(g); Md. Crim. Law Code Ann. §413(g)(6); Mo. Rev. Stat. §565.012.3(4); Mont. Rev. Codes Ann. §46-18-304(6); Neb. Rev. Stat. §29-2523 (2)(e); Nev. Rev. Stat. §200.035(4); Or. Rev. Stat. §163.115(3); S.C. Code §16-3-20(C)(b)(4); Tenn. Code Ann. §39-2404(j)(5); Utah Code Ann. §76-3-207(1)(f); 1981 Wash. Laws Chap. 138, §7(4); Wyo. Stat. §6-4-102(j)(iv).

2. Deterrence

The next question which should be examined is whether the Florida Legislature could rationally conclude that a potential offender would be deterred from committing one of the enumerated underlying felonies if the possibility of capital punishment were real. When evaluating the propriety of Florida's legislative determination, the Court should note the presumption of validity accorded to various legislative determinations. Justice White, dissenting in the now famous abortion case, Roe v. Wade, 410 U.S. 113, 222 (1973), summarized the applicable standard of review:

> In a sensitive area such as this, involving as it does issues over which reasonable

men may easily and heatedly differ, I cannot accept the Court's exercise of its clear power of choice by interposing a constitutional barrier to state efforts to protect human life and by investing mothers and doctors with the constitutionally protected right to exterminate it. This issue, for the most part should be left with the people and to the political processes the people have devised to govern their affairs. (Emphasis added).

Petitioner has argued that because the death penalty has not been imposed often in a felony-murder context, a fact which is not supported by experience in Florida,[10] death cannot be a deterrent

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[10]Of the sixty-six inmates awaiting execution at Florida State Prison whose death sentences have been affirmed by the Florida Supreme Court, forty-five (68%) were involved in the commission of underlying felonies when homicides occurred. See Appendix.

to the commission of the underlying felony. To support this argument, Petitioner has relied upon three studies conducted in 1926, 1948, and 1975, and cited in a comment to the Model Penal Code. However, these studies were merely compilations of the number of crimes reported and the number of times deaths had resulted during the commission of those crimes. Respondent fails to comprehend how any conclusion can be drawn about deterrence when no one knows how many crimes were not committed because of fear of the punishment which could be imposed. Notwithstanding the inherent unreliability of such statistics, Petitioner's argument must fail because he has provided no statistics (nor could he) for crimes which were not committed because of fear

of capital retribution.

Rather than rely upon strained interpretations of confusing and conflicting statistics, Respondent urges that the Court continue to apply a policy of common sense. In that regard, consider the example of the smart or experienced criminal who, by exercising his dominion and influence over a less mentally gifted criminal is able to procure or persuade him to commit one of the underlying felonies and a death occurs.

Should the one who planned and instigated the felony, but who stayed away because he was shrewd enough to be aware that he would not be eligible for the ultimate penalty, be allowed to escape full culpability for homicides which would never have occurred but for

his setting the crime in motion? This is especially true when the actual perpetrator has received a death sentence. Obviously, the answer to this question should be a resounding NO! In fact, who is more deserving of severe punishment -- shouldn't it be the criminal who caused the crime to occur? Since an aider and abettor can be as culpable and can be punished as a principal is "beyond constitutional challenge," Lockett, supra, at 438 U.S. 602, no thinking person can deny that there is a strong public policy against immunizing such a defendant from equivalent culpability in sentencing!

Moreover, the same rationale would apply to an adult criminal who hires or

persuades a juvenile to commit a felony in which a death occurs. In jurisdictions in which certain juveniles are not treated as adult offenders, should the adult be insulated from full criminal responsibility simply because the principal who committed the murder cannot receive a death sentence? Again, the answer must no. Otherwise, experienced adult criminals would simply have juveniles do the dirty work for them -- common sense mandates that the state legislatures be permitted to enact laws which would prevent such ruthless situations from being able to occur and continue. Do not encourage the emergence of untold Fagins.

Another example, also contrary to prudent public policy, that would be certain to occur if Petitioner's argument is accepted by the Court, concerns what would happen at the trial of a defendant who actually pulled the trigger in a case like Petitioner's. Defense counsel would surely attempt to evoke the jury's sympathy by pointing out that the "person really responsible," i.e., the one who, like Petitioner, planned, initiated, and assisted in covering up the crime, could not receive the maximum sentence.

This watering-down effect on capital punishment during trials of killers should not be permitted. The time has come for this Court to allow society to implement those laws designed to stop those who senselessly and needlessly violate the laws which most of us

respect. Respondent urges that this Court not prohibit the States from enacting and enforcing laws which deter crime. After all, even Counsel for Petitioner would not seriously dispute that state governments have a duty to protect all citizens' constitutional rights to be safe and secure in their homes and communities and to enjoy "domestic tranquility." In other words, citizens have rights also and one is the right to enact laws designed to promote "domestic tranquility."

Finally, should Petitioner be successful in persuading the Court to create a rule that one who does not intend death cannot receive the death penalty, regardless of the foreseeability of the dangerousness of his crime, the next step would be an attack upon capital

punishment for those who planned death but did not actually commit the killing. Consider the example of one who initiates a contract killing. Although the planner and procurer has an intent to cause a victim's death, should he be allowed to escape full responsibility because he deliberately was not present and did not pull the trigger? Again the answer must be a resounding no. In Florida, as well as at least twenty-four (24) other states,[11] the state legislatures have

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[11]The following states either specifically make murder for hire a capital offense or allow a murder conviction to be aggravated for sentencing purposes if the defendant hired someone to commit murder: Ariz. Rev. Stat. Ann. §13-703(f)(4); Ark. Stat. Ann. §41-1501(1)(g); Colo. Rev. Stat. §16-11-103(6)(e); Conn. Gen. Stat. §53a-54b; Del. Code Ann. tit. 11, §4209(e)(h); Ga. Code §27-2534.1(6); Idaho Code §19-2515(f)(4); Ill. Rev. Stat. ch. 38, §9-1(b)(5); Ind. Code §35-50-2-9(b)(5); La. Code Crim. Pro. Ann. art. 905.4(e) (West); Md. Crim.

refused to allow such a bizzare and arbitrary distinction to erode the effectiveness of capital punishment. This type of law is a rational response by those responsible for the health, safety, and welfare of the people, and Petitioner has been unable to demonstrate how such a rational determination offends the Constitution.

3. Moral Outrage

In the 1976 death penalty cases which upheld capital punishment, the

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(continued from previous page) Law Code Ann. §413(d)(7); Miss. Code Ann. §97-3-19(2)(d); Mo. Rev. Stat. §565.012.2(6); Neb. Rev. Stat. §29-2523(1)(c); N.H. Rev. Stat. Ann. §630.01(I)(c); Ohio Rev. Code §2929.04(A)(2); Okla. Stat. Ann. tit. 21, §701.12.3; Or. Rev. Stat. §163.095(1)(b); S.C. Code §16-3-20(C)(a)(6); S.D. Compiled Laws Ann. §23A-27A-1(5); Tenn. Code Ann. §39-2404(i)(4); Tex. Penal Code Ann. tit. 5, §19.03(a)(3); Vt. Stat. Ann. tit. 13, §2301; 1981 Wash. Laws Chap. 138, §2(5).

Court also noted that retribution and incapacitation were viable theories to support capital punishment. Respondent would add that both incapacitation and retribution (moral outrage) are equally applicable in felony-murder situations. In response to Petitioner's argument that a death sentence would not deter a murderer, Respondent simply points out that the justification for such punishment in cases like Petitioner's is deterrence from commission of the underlying felony and as a result the forseeable, albeit unintended, homicide.

Also, the concept of moral outrage is even more appropriate in felony-murder cases than in cases involving premeditated murder, because most premeditated murders arise out of crimes of passion which are based upon motive -- crimes

where the death penalty is rarely imposed. An unintended murder is still murder even though it arises out of the commission of a felony such as rape or armed robbery. This type of crime can strike any citizen without rhyme or reason and therefore people have just cause to fear and despise it the most.

Finally, the propriety and rationality of Florida's legislative determination that the ultimate penalty is appropriate in a case like this becomes strikingly apparent when one considers that a criminal has nothing to lose if he or his accomplice murders his victim during or after completion of the underlying felony. If the victim is not murdered, he might return to assist in convicting the criminal of the underlying

felony. On the other hand, if the victim is murdered, there is absolutely no possibility of future identification by the victim, and the criminal might escape responsibility for his heinous crimes altogether.[12]

In other words, a felon has everything to gain and nothing to lose by murdering the victim of the underlying felony because he usually cannot receive a greater punishment than the life sentence he is probably already subject

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[12]In a very recent case, Vaught v. State, ___ So.2d ___, No. 52,835 (Fla., opinion filed Jan. 7, 1982), the Supreme Court of Florida recognized the value of such a sanction and upheld the death sentence of a defendant who was found to have murdered in order to prevent subsequent identification by the victim. See also: Hargrave v. State, 366 So.2d 1,5 (Fla. 1978), cert. denied, 444 U.S. 919 (1979).

to for commission of one or more of the serious enumerated felonies. Judicial acceptance of such a result would be tantamount to the issuance of "death warrants" for innumerable convenience store clerks and service station operators who are the present-day targets of thugs who have little or no regard for the lives of others. Obviously, this is an anomalous situation which the Florida Legislature, or any other legislature responsible for the protection of its constituents, cannot allow to occur. Indeed, Respondent submits that it would be irresponsible for any legislative body to permit a situation which does not allow an added effective sanction to penalize a criminal for an additional, though not originally planned, heinous act -- in this case first degree murder.

More importantly and more relevant to a disposition of this case, no objective or rational person could seriously argue that a legislative body could not infer or conclude that capital punishment for the commisson of a serious felony which results in death of a human being would not deter others from engaging in such felonious conduct. Likewise, a legislative body could rationally conclude that if capital punishment were available, felons would avoid injury to their victims at all costs.[13] The fact that deaths

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[13]In a 1970-71 study conducted by the Los Angeles Police Department, it was found that 50.5% of a group of arrestees who either were unarmed or failed to use their weapons were deterred by fear of the death penalty. See Amicus Curiae brief of California, p. 38, filed in Gregg v. Georgia, supra.

occur in only a relatively small number of the hundreds of thousands of robberies committed each year demonstrates that the perpetrators well know the consequences that can result where a death is involved.

Petitioner has failed to demonstrate that a legislature could not so conclude, and the Gregg, Proffitt, and Jurek cases unequivocally require him to carry that heavy burden. The next question which must be resolved is whether the death sentence was appropriate in Petitioner's case.

ARGUMENT

II.

PETITIONER'S DEATH SENTENCE WAS APPROPRIATE BECAUSE OF HIS EXTENSIVE INVOLVEMENT IN THE CRIMINAL ACTIVITY, THE NATURE AND CIRCUMSTANCES OF THE CRIME, AND THE FACT THAT HE PRESENTED ABSOLUTELY NO EVIDENCE IN MITIGATION.

Petitioner has somehow concluded that both the trial court and the Supreme Court of Florida afforded inadequate consideration to his extent of participation in the murders and robbery. This conclusion is apparently based upon Petitioner's independent conclusion that § 921.141(6)(d), Fla. Stat., concerning the extent of an accomplice's participation, should have been found. Then, after manufacturing an inapplicable mitigating circumstance, Petitioner has asserted that his death sentence cannot

stand because the remaining aggravating circumstances, in his opinion, do not outweigh the mitigating. However, the Florida courts' findings of the inapplicability of any mitigating circumstances, either statutory or non-statutory, are supported by the record, and Petitioner's death sentences should not be disturbed.

Respondent recognizes that Lockett v. Ohio, supra, mandated that in a capital case the sentencing authority "not be precluded from considering as a mitigating factor, [emphasis in original] any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. at 438 U.S. 604. (Emphasis added). Ohio's statute failed to pass

constitutional muster because it prevented the sentencing authority from giving independent mitigating weight to aspects of the defendant's character and record and because it prevented consideration of the "circumstances of the offense proffered in mitigation" by the defendant. Id. at 438 U.S. 605 (Emphasis added). As has previously been noted, see n. 1 at p. 4, infra, Florida'a death penalty statute allows any evidence relevant to the nature of the crime and the character of the defendant to be admitted in mitigation. See §921.141 (1), Fla. Stat.; Lockett v. Ohio, supra; Proffitt v. Florida, supra, Shriner v. State, 386 So.2d 525, 533 (Fla. 1980), cert. denied, 101 S.Ct. 899 (1981).

It is extremely critical that the Court be aware that during the sentencing phase of the trial, not only did Petitioner fail to introduce or proffer any evidence concerning the extent of his involvement in the crimes, but also that he failed to present or proffer any evidence at all in mitigation. (R 1677). How then can Petitioner be heard to complain to this Court that the Florida courts failed or refused to consider relevant mitigating circumstances when he neither introduced nor proffered any evidence in his behalf? Surely, he cannot!

However, notwithstanding Petitioner's total failure to proffer or present any mitigating evidence, it is clear from the record that both the trial court and the Supreme Court of Florida

considered and rejected the applicability of the mitigating circumstance concerning Petitioner's degree of participation in the crimes. Thus, Petitioner's case is completely unlike Eddings v. Oklahoma, supra, in which the Oklahoma courts failed to consider certain evidence which had been introduced for purposes of mitigation. For example, the trial court in its written findings, which were reproduced in the Florida Supreme Court's opinion, (J.A. 53) stated:

> As to FS 921.141(6)(d), the evidence clearly indicates that the defendant was an accomplice to the capital felony and that his participation in the capital felony was major. The defendant Enmund planned the capital felony and actively participated in an attempt to avoid detection by disposing of the murder weapons.

Enmund v. State, 399 So.2d 1362, 1373 (Fla. 1981). The Supreme Court of

Florida agreed with the trial court's conclusion that § 921.141(6)(d) was inapplicable. Id. Moreover, it is clear from the Florida Supreme Court's statement of facts that that Court was aware of Petitioner's extensive involvement in the crimes -- Enmund initiated the plan for the robbery (Id. at 1365, J.A. 38; R 997-1000), was seen near the scene of the crimes on the morning of the murders (Id. at 1364, J.A. 37; R 1300-1303), admitted that he had seen Mr. Kersey with the money when he was present on Kersey's property (R 1205, 1206), and caused disposal of the murder weapons (Id. at 1366, J.A. 41; R 1201). Just because evidence of a mitigating circumstance could have been introduced, it does not necessarily follow that such a mitigating fact had to be found to

exist. Eddings v. Oklahoma, supra; Hargrave v. State, supra. Petitioner's assertion that his involvement in the crimes was minor is simply wishful thinking -- as the record clearly shows, the crimes never would have occurred had it not been for Earl Enmund.

Finally, there are at least three reasons why this Court must reject Petitioner's assertion that he should be resentenced because the Supreme Court of Florida eliminated certain aggravating circumstances found by the trial court. First, contrary to Petitioner's wishful thinking, no mitigating circumstances were applicable and none were found. Second, two valid (and now unchallenged) aggravating circumstances were found -- under Florida law, death is presumed to be the appropriate sentence when there is

nothing in mitigation and at least one aggravating circumstance exists. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied 416 U.S. 943 (1974). Third, under Florida law, when the reviewing court can determine from other validly found aggravating circumstances that "the weighing process has not been compromised," a death sentence will not be disturbed. Brown v. State, 381 So.2d 690, 696 (Fla. 1980), cert. denied, 101 S.Ct. 931 (1981); Hargrave v. State, supra. Petitioner was not denied due process during the sentencing proceedings in the Floirda courts, and his death sentences should not be disturbed.

CONCLUSION

The Constitution does not require a finding of intent before a defendant can be found criminally responsible for his

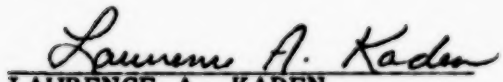
actions, and Petitioner has failed to offer a compelling reason why this Court should judicially create such a bright line rule. Rather, Florida's statute focuses on the facts and circumstances of the crime, as well as the character of the perpetrator, Eddings v. Oklahoma, supra, and culpability is rationally based upon concepts of forseeability.

During the sentencing phase of his trial, Petitioner neither introduced nor proffered any evidence in mitigation, and he should not be heard now to complain that the Florida courts "refused" to consider his degree of involvement in the murders. The facts and circumstances found to exist by the judge and jury are supported by the record and are sufficient to support the judgments and sentences of death. Therefore, the

decision of the Supreme Court of Florida upholding the judgments and sentences of death should be affirmed.

Respectfully submitted,

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APPENDIX

Adams v. State, 341 So.2d 765 (Fla. 1977)(robbery).

Aldridge v. State, 351 So.2d 942 (Fla. 1977)(robbery).

Alvord v. State, 322 So.2d 533 (Fla. 1975)(sexual battery).

Armstrong v. State, 399 So.2d 953 (Fla. 1981)(robbery).

Booker v. State, 397 So.2d 910 (Fla. 1981)(sexual battery, burglary).

Brown v. State, 381 So.2d 690 (Fla. 1980)(sexual battery, robbery).

Buford v. State, 403 So.2d 943 (Fla. 1981)(burglary, sexual battery).

Clark v. State, 379 So.2d 79 (Fla. 1979)(kidnapping).

Combs v. State, 403 So.2d 418 (Fla. 1981)(robbery).

Cooper v. State, 336 So.2d 1133 (Fla. 1976)(robbery).

Darden v. State, 329 So.2d 287 (Fla. 1976)(robbery, assault with intent to commit murder).

Elledge v. State, 346 So.2d 998 (Fla. 1977)(sexual battery).

Enmund v. State, 399 So.2d 1362 (Fla. 1981)(robbery).

Ford v. State, 374 So.2d 496 (Fla. 1979)(robbery).

Foster v. State, 369 So.2d 928 (Fla. 1979)(robbery).

Francois v. State, Case No. 54,461 (Fla., opinion filed Oct. 15, 1981) (robbery).

Funchess v. State, 341 So.2d 762 (Fla. 1977)(robbery).

Goode v. State, 365 So.2d 381 (Fla. 1978)(sexual battery).

Hall v. State, 403 So.2d 1321 (Fla. 1981)(kidnapping, sexual battery).

Hargrave v. State, 366 So.2d 1 (Fla. 1978)(robbery).

Henry v. State, 328 So.2d 430 (Fla. 1976)(robbery).

Jackson (Carl) v. State, 359 So.2d 1190 (Fla. 1978)(robbery).

Jackson (Ronald) v. State, 366 So.2d 752 (Fla. 1978)(robbery).

Jacobs v. State, 396 So.2d 1113 (Fla. 1981)(robbery).

Jent v. State, Case No. 58,744 (Fla., opinion filed Dec. 3, 1981) (sexual battery).

Johnson v. State, 393 So.2d 1069 (Fla. 1981)(robbery).

King v. State, 390 So.2d 315 (Fla. 1980)(robbery, sexual battery, arson).

Knight v. State, 338 So.2d 201 (Fla. 1976)(robbery, kidnapping).

LeDuc v. State, 365 So.2d 149 (Fla. 1978)(sexual battery).

McCrae v. State, 395 So.2d 1145 (Fla. 1980)(sexual battery).

Meeks v. State, 339 So.2d 186 (Fla. 1976)(robbery).

Messer v. State, 30 So.2d 137 (Fla. 1976)(robbery).

Mikenas v. State, Case No. 49,928 (Fla., opinion filed Nov. 5, 1981) (robbery).

Peek v. State, 395 So.2d 492 (Fla. 1975)(sexual battery, burglary).

Proffitt v. State, 315 So.2d 461 (Fla. 1975)(burglary).

Raulerson v. State, 358 So.2d 828 (Fla. 1978)(robbery, sexual battery).

Ruffin v. State, 397 So.2d 277 (Fla. 1981)(kidnapping, sexual battery).

Shriner v. State, 386 So.2d 525 (Fla. 1980)(robbery).

Sireci v. State, 399 So.2d 964 (Fla. 1981)(robbery).

Smith v. State, 365 So.2d 704 (Fla. 1978)(robbery).

Sullivan v. State, 303 So.2d 632 (Fla. 1974)(robbery).

Thompson v. State, 389 So.2d 197 (Fla. 1980)(kidnapping, sexual battery).

Vaught v. State, Case No. 52,835 (Fla., opinion filed Jan. 7, 1982) (robberry).

Washington v. State, 362 So.2d 658 (Fla. 1978)(kidnapping, robbery).

White v. State, 403 So.2d 331 (Fla. 1981)(robbery).

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No. 81-5321

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

EARL ENMUND,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

REPLY BRIEF FOR PETITIONER

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Questions Presented

1. Whether death is an unconstitutionally excessive and disproportionate penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life?

2. Whether petitioner's degree of participation in the killings was given inadequate consideration and inadequate weight by the Florida courts, thereby violating his rights under the Eighth and Fourteenth Amendments?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

EARL ENMUND,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

REPLY BRIEF FOR PETITIONER

Respondent's brief necessitates reply. It distorts the issues by misconceiving (A) petitioner's constitutional contentions, (B) the application of those contentions to the operation of Florida's capital-sentencing statute, and (C) the

application of those contentions and of that statute to the facts and proceedings in this case.

A. Respondent Misconceives Petitioner's Legal Contentions

Respondent repeatedly ascribes to petitioner an argument which would erect a "bright line rule" for capital-sentencing determinations that is somehow inconsistent with particularized consideration of the facts of each individual case in which the death penalty is in issue. E.g., Resp. Br. 28-33. Petitioner makes no such argument. Earl Enmund's case necessarily presents the question of the minimum state of culpability that can support a death sentence conforming to the Eighth and Fourteenth Amendments' command of proportionality in capital sentencing. At or above that minimum state, capital punishment may and must be individualized. E.g.,

Eddings v. Oklahoma, ___ U.S. ___, 50 U.S. L.W. 4161 (January 19, 1982). Below that minimum state, capital punishment is forbidden. Coker v. Georgia, 433 U.S. 584 (1977).

This latter prohibition is not petitioner's invention. Coker established it upon abundant Eighth Amendment authority. See cases cited in Petr. Br. 10-11. Unless Coker is overruled, and unless the Eighth and Fourteenth Amendments are held to permit a death sentence for petty larceny or vehicular homicide, some line must be drawn between degrees of culpability for which the States can and cannot inflict the punishment of death.[1/] A

1/ In the midst of its attack on "bright lines," respondent at one point suggests its own such demarcation: between homicidal and nonhomicidal crimes. Resp. Br. 36-37. As the vehicular homicide example suggests, and as the analysis in Petr. Br.

[Footnote 1/ continues on next page.]

"brighter" line would seem better than a "murkier" one for this purpose, so that reviewing courts need not make a de novo judgment upon each death sentence. But, in any event, petitioner contends that the facts of his case fail to establish the minimum state of culpability required by the Eighth Amendment for a death sentence either (a) under the relatively bright-line principle convincingly articulated in Justice White's concurring opinion in Lockett v. Ohio, 438 U.S. 586, 624-25 (1978),[2/] or (b) under any proper individualized con-

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1/ continued

16-17 demonstrates, such a line is inconsistent with the "objective indicators of society's 'evolving standards of decency'" (Coker v. Georgia, supra, 433 U.S. at 603 (Justice Powell, concurring)).

2/ We say relatively bright-line because of the substantial flexibility available to legislators in framing, and triers of fact

sideration of the relevant facts and circumstances shown by the record here.[3/]

2/ continued

in applying, intent-based standards. See Petr. Br. 44 n.64.

As we note in our opening brief, the constitional rule might be limited to three objective factors whose absence here distinguishes this case from almost every other case in which a death penalty has been imposed in this country over the past decade: (i) physical participation in the lethal act; (ii) presence at the site of the act, and (iii) participation in a plot to kill, if absent. Petr. Br. 36 n.55. See Appendix E to Petr. Br. (separately bound). Such a rule would be narrower, but it would require factual determinations less common in the criminal law of the various States than a simple determination, required in some well-established form by the criminal codes of all fifty States, of whether the defendant had a conscious purpose to kill.

3/ Respondent is of two minds about the individualized consideration due the relevant circumstances of Earl Enmund's case. At one point, Florida grudgingly concedes that "the fact that it was not proved that Petitioner intended the murders to occur might be relevant in mitigation."

[Footnote 3/ continues on next page.]

This major misconception of petitioner's argument is embroidered by a number of minor ones. First, petitioner has not "argued that ... the death penalty

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3/ continued

Resp. Br. 9. This much and more, of course, is established by Lockett v. Ohio, supra, which reversed the death sentence of a felony-murder accessory -- who proposed and assisted in planning the robbery, offered to secure a weapon to use in carrying it out, drove the getaway car, and hid the murder weapon and two of her accomplices from the police, 438 U.S. at 590-91 -- because her limited participation in the homicide itself, and her lack of an intent to kill, had not been considered in mitigation. Id. at 604.

Elsewhere, however, respondent approvingly acknowledges "the Florida courts' findings of the inapplicability of any mitigating circumstances" in petitioner's case. Resp. Br. 65 (emphasis added).

Respondent cannot have it both ways. It cannot argue that individualized mitigating consideration of the lack of an intent to kill and of nonparticipation in the lethal act is sufficient to make a death sentence imposed in such circumstances constitutional, and then turn around and argue that those factors are somehow devoid of "any mitigating" weight in petitioner's case. See Petr. Br. 47-49.

has not often been imposed in a felony-murder context." Resp. Br. 49. Petitioner has argued and demonstrated that the death penalty has infrequently been imposed upon offenders who neither took life, attempted to take life, or intended to take life, and whose guilt of first-degree murder was therefore established solely under the felony-murder rule. Petr. Br. 32-36; Apendices D and E. Petitioner's argument would not make the death penalty unavailable to the States in felony-murder cases, or even forbid the States to consider the fact of felony-murder as an aggravating circumstance in cases meeting the minimum level of culpability for a constitutional death sentence. Respondent's page 49, footnote 10 thereon, and Appendix thereto, referring to death sentences meted out in Florida for killings in "a felony-murder context" (Resp. Br.

49), are all simply wide of the mark.[4/]

The same misconception animates respondent's analysis of the various state statutes which it categorizes in footnote 8 at pages 43-45. Respondent asks the wrong questions about these statutes,[5/] and gets

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4/ In each case cited by respondent in its appendix--save, of course, petitioner's--the defendant either took life or was actually present aiding and abetting a codefendant who took life. See Petr. Br. Appendix E. While an intent to take life is, of course, not required under Florida law either to convict a defendant of first-degree murder or to sentence him to die, the fact is that in the vast majority of the "felony-murder context" cases cited by respondent in its appendix, unlike petitioner's case, the Florida Supreme Court either expressly found, or expressly affirmed the trial court's or jury's finding, that the defendant intended that life be taken. The cases are analyzed in the Appendix to this Reply Brief.

5/ Respondent asks which "statutes allow an aider and abettor to be convicted of a capital offense, even though intent to murder either has not been or cannot be proved." Resp. Br. 43 n.8. By looking

the wrong answer.[6/]

Respondent is similarly remiss in reporting the progress of death penalty

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5/ continued

solely at provisions defining the crime of capital murder, respondent simply misses the fact that: (1) several States include a requirement that the felony-murder defendant have taken life, or have intended to do so, in the aggravating or mitigating circumstance portions of their capital-sentencing statutes (see the United States, Arkansas, Colorado, Illinois, Indiana, New Mexico and North Carolina provisions cited in Petr. Br. 28-29 nn.43-40); and (2) several States do not even include felony-murder as an aggravating circumstance that will justify imposition of the death penalty (see the Arizona, Idaho, Montana, Nevada, Oklahoma, and South Dakota statutes cited in Petr. Br. 29 n. 45).

6/ Contrary to Respondent's assertion, six statutes it cites (Arkansas, Delaware, Kentucky, Texas, Utah, and Washington), do include mens rea requirements in setting forth those types of murder or felony-murder that are capital. Those requirements are all quoted in Petitioner's Opening Brief at page 28 n.43. (Respondent's citation of a Washington statute that was recently ruled unconstitutional and later reenacted in a different form accounts for

legislation presently being considered in the United States Senate. Although it is true that Senate Bill 114 originally "would [have] authorize[d] the imposition of the death penalty for a number of federal felonies in which death results, even if there is no finding that the defendant either committed the crime with the conscious purpose of causing death or participated in the homicidal act," Resp. Br. 23, Senator Thurmond's Judiciary Committee amended the bill before reporting favorably upon it. The amendment requires that every death sentence be supported by a finding that the defendant either "intentionally killed," "intentionally inflicted serious

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6/ continued

one of these errors. See Petr. Br. 28 n.43.) The Oregon death-penalty statute cited by respondent was ruled unconstitutional in 1981, State v. Quinn, 623 P. 2d 630 (Ore. 1981), and Oregon remains without a death penalty at this time.

bodily injury," or "intentionally participated in an act which he knew or reasonably should have known would create a grave risk of death to a person,...and the victim did die as a direct result of the act." S. Rep. 143, 143, 97th Cong., 1st Sess. 33 (1981) (emphasis added). The Committee concluded that this requirement of "a high level of culpable involvement in the homicide" was necessary "to meet constitutional difficulties under Coker v. Georgia." Id. at 5.

Respondent's most remarkable misstatement of petitioner's constitutional contentions is its assertion that the "next step" following acceptance of those contentions "would be an attack upon capital punishment for those who planned death but did not actually commit the killing." Resp. Br. 55-56. Petitioner's argument that a death sentence is unconstitutional (either on the facts of this particular case or in gen-

eral) in the absence of an intent to take human life obviously does not look to immunizing persons who deliberately hire or solicit others to kill for them. It looks 180 degrees in the opposite direction.

B. Respondent Misconceives the Application of Petitioner's Contentions to Florida's Capital-Sentencing Statute

Respondent's asserted justifications for inflicting the death penalty in cases of accessorial liability for unintended homicides occurring during a felony involve similar misconceptions of petitioner's contentions, as well as complementary misconceptions of the Florida death-penalty statute.

First, respondent asserts that "[j]udicial acceptance of [petitioner's position] ... would be tantamount to the issuance of 'death warrants' for innumerable convenience store clerks and service

station operators" (Resp. Br. 61) whom robbers would thereby be licensed to kill "in order to prevent subsequent identification by the victim" (Resp. Br. 60 n.12; see also Resp. Br. 8-9). Of course nothing in any of petitioner's contentions would forbid death sentences in such cases as respondent describes which are all, by express ("witness elimination") hypothesis, intentional killings. Nor would any prosecutor have any difficulty in convincing the trier of fact to infer such an intent to kill in any case where the facts supported the inference -- as, indeed, occurred in the only two actual cases cited in this context by respondent. (See the analysis of the Vaught and Hargrave cases in the Appendix, infra.)[7/]

7/ Respondent goes so far as to say that a robber in Florida "has ... nothing to lose by murdering the victim" unless he

But the Florida statute does not require a finding of intent to kill or to "eliminate witnesses" (see Resp. Br. 9) as the condition of a death sentence for accessorial felony-murder, and the facts of petitioner's case will support no such finding. To the contrary, the Florida Supreme Court found that the killings here were the "spontaneous" actions of petitioner's robbery accomplice, Sampson Armstrong, undertaken in petitioner's absence after one of the robbery victims

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7/ continued

faces the death penalty. Resp. Br. 60. This assertion is absurd. In Florida, as elsewhere in the United States, the penalty for murder is greater than the penalty for robbery. Compare Fla. Stat. Ann. §§ 775.082, 813.13, 947.16 (first-degree murderer not sentenced to die must receive a life sentence without possibility of parole for 25 years; robber who does not kill may be sentenced to any term of years from 0 to life, and may be paroled at any time after one year.)

opened fire on Armstrong and his wife. A. 55; 399 So. 2d at 1373, incorporating Armstrong v. State, 399 So. 2d 953, 963 (Fla. 1981).

Both respondent's "creation of risk" (Resp. Br. 39-47) and "deterrence" (Resp. Br. 48-63, especially 60-63) justifications also defend a Florida statute that does not exist. These arguments expressly justify the death penalty for the underlying felony, not for a killing that "spontaneously" occurs during its commission. If they were valid arguments, Coker v. Georgia could not have been decided as it was, since rape no less than robbery is, and has been determined by "numerous state legislatures [to be,] ... so dangerous that death is a forseeable and likely result of participation in that conduct." Resp. Br. 43-44.

The Florida statute under which petitioner stands condemned to die does not

require a finding of foreseeability of death -- let alone a finding that "loaded firearms are used" in the underlying felony, Resp. Br. 42. To the extent that it expresses a generic finding of the life-endangering character of all enumerated felonies, that finding no more justifies the death penalty for Earl Enmund than for Ehrlich Coker. See Petr. Br. 7-10.

Respondent plays the operation of the Florida statute false in yet another critical regard. Under that statute, respondent says, "[i]n practice, a death sentence for an aider and abettor will only be imposed in extreme cases where the defendant's involvement is major." Resp. Br. 46-47. Petitioner's death sentence suffices to refute this glib assertion. Nowhere in its brief does respondent tell us what "extreme cases" means or undertake to demonstrate that petitioner's is one of

them. Respondent does argue that petitioner's involvement in the robbery, not the murder "was major," but this, again, is a justification for punishing the robbery, not the murder, with death. And in any event, respondent arrives at even this insufficient justification by disregarding -- and in some cases misrepresenting -- the record, to which we next turn.

C. Respondent Misstates the Facts and Prior Proceedings of Record

Page limitations required the omission of a detailed statement of the facts from petitioner's initial brief. Consequently, respondent has charged that "[p]etitioner's statement of the case omits material facts" (Resp. Br. 1) and has exploited this omission by offering a grossly incomplete and slanted version of the record. We now set the record straight.

1. The evidence at the guilt-innocence phase

The following evidence was presented at the first phase of petitioner's bifurcated jury trial:

At 7:45 a.m. on April 1, 1975, Harold Elems was working on his property in a rural portion of Hardee County, Florida, when he heard "[w]hat appeared to be gunfire ... ," R. 1043, i.e., "more than six but not fifteen" shots fired "in a short length of time." R. 1044. Although he could not then see the nearby Kersey home, a minute or two later he drove his truck to within 100 yards of the back of that house, of which he had "a pretty clear view ... for probably a minute or so." R. 1044-45. Seeing nothing unusual, Mr. Elems drove on, arriving at his destination, several minutes away, at precisely 7:50 a.m. R. 1045-47. He testified that as of

approximately 7:47 a.m. he noticed no cars on or near the road in front of the Kersey property. R. 1047.

The bodies of Thomas and Eunice Kersey were discovered between 7:55 and 8:00 a.m., on April 1. They were lying head to head, partially in the kitchen and partially across the rear doorway. R. 1019-21, 1056, 1070. Mr. Kersey had been shot twice, his wife six times. R. 1102, 1106. No weapons were discovered at the scene or introduced at trial, R. 1567, although a ballistics expert testified that bullets had been fired from a .22 and a .38 caliber weapon. R. 1055-57, 1139-41.

The police were unable to locate Mr. Kersey's wallet (R. 1084-85), although testimony at trial indicated that he kept it on his person at all times. The night before he was shot, Mr. Kersey told his son that he had $1,400 or $1,500 in his

wallet. R. 1013-14.[8/]

The State relied almost exclusively on the testimony of Jay B. Neal, a close friend of Sampson Armstrong, for a description of the events at the Kersey residence on the morning of April 1, 1975. R. 1345. According to Neal, Armstrong told him "about a job" he and his wife Jeanette Armstrong "had done," during which an "old lady shot Jeanette." R. 1347-48. Sampson told Neal that he and his wife went to the door of a ranch house owned by "two old persons" and asked for some water because their "car had run hot." R. 1348. When the man went behind his house to get a water jug, Sampson "grabbed the old man ... around the neck and put the

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8/ According to several witnesses, Mr. Kersey usually carried large sums of money in $100 denominations in his wallet and liked "to flash his money around," not only among friends and at church, but also to strangers. R. 993, 1005-06, 1010.

gun on him ... holding him to the back door like." R. 1349. According to Neal, Sampson then said that:

> He was telling Jeanette to get the money. And somehow or other the old man hollered for his wife and his wife heard the scream and he could look through the back window and see the old lady coming around the house with the gun.... As soon as she got there she shot and hit Jeanette and he hit the old man and knocked him down and shot the lady.... By the time he shot the lady and the old man got up and he shot the old man in the chest.... Then he say he took them in the house and put them head by head ... [and] left ....
> 9/

R. 1350-51.

9/ Police testimony established that Jeanette Armstrong was admitted to a local hospital with a gunshot wound on April 1, 1975, and that a blood sample taken from her matched a blood stain found inside the Kersey home, which did not match either victim's blood. R. 1057, 1070-71, 1125-30, 1157.

[Footnote 9/ continues on next page.]

Contrary to respondent's false assertion that "Armstrong had told [Jay B. Neal] that he, petitioner, and Armstrong's wife had robbed and killed an elderly couple," Resp. Br. 3, Neal did not implicate petitioner in any way. Indeed, as the Florida Supreme Court noted on appeal, Neal's account "did not include any reference to [petitioner]." A. 49; 399 So. 2d at 1270. Nor did the crime-scene evidence implicate petitioner in either the robbery or the

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9/ continued

Jeanette Armstrong's mother, Ida Jean Shaw, also corroborated Neal's testimony in several respects. Ms. Shaw testified that her daughter confessed to her about "a robbery," R. 1190, 1196, and that Sampson Armstrong told her that he had $600 left "out of the robbery." R. 1197; see also R. 1195-96, 1202, 1246-47. According to Shaw, Sampson also told her "he made sure that the people was dead." R. 1207-08. Finally, Ms. Shaw testified that she saw either Jeanette Armstrong or Sampson Armstrong with a .38 caliber weapon sometime before April 1, 1975. R. 1200-01.

shootings that began when Mrs. Kersey fired on Jeanette Armstrong.

The only evidence linking petitioner to the robbery falls into three categories:

(i) Sometime during the early part of March, 1975, petitioner and two acquaintances stopped at Mr. Kersey's house to buy a calf that Mr. Kersey had advertised for sale. Upon receipt of the purchase money, Mr. Kersey displayed the contents of his wallet to all present, precipitating a discussion among the four men about "the money this man's got." R. 997-1000.

(ii) The State introduced the testimony of Willie Lee, a neighbor of petitioner, who was standing on the road outside his house on April 1, 1975 for several hours waiting for a ride that never came. R. 1298, 1302. As summarized by the Florida Supreme Court, Lee

> said that at approximately 6:30 or 6:45, he saw Earl Enmund and his former common-law wife Ida Jean Shaw in their yellow Buick with a vinyl top. Ida Jean Shaw was driving. There were two others in the back seat, one male and one female. The car traveled north toward town. ... At about 8:00 o'clock, the car came back travelling "pretty fast" ..., with [petitioner] ... driving, Ida Jean Shaw in the front seat, and one of the two other people in the car lying down across the back seat.

A. 37; 399 So. 2d at 1364-65; see R. 1300-04. Lee testified that the male and female occupants of the back seat were "younger" and black, as are Sampson and Jeanette Armstrong. R. 1301, 1307-08, 1323.

The State also introduced the testimony of Mary Alice Gibbs and Robert Clark Davis, who drove past the Kerseys' home at around 7:35 on the morning of April 1. Both saw a yellow or cream-colored car

just off to the right (east) side of Route 62, about 200 yards west of the Kersey residence, and both saw "one person in the car under the [steering] wheel." R. 1025, 1026, 1028, 1037, 1039. The only positive description of that person at trial was Mrs. Gibbs' statement that she saw "a black male in the car."[10/] The Florida Supreme Court concluded that Mrs. Gibbs' testimony was the "only evidence," albeit "inferen-[tial]" evidence, that placed petitioner in the vicinity of the Kersey home when Sampson and Jeanette Armstrong robbed and killed its occupants. A. 49-50; 399 So. 2d at 1370.

10/ Mrs. Gibbs testified that the car "had an 18 tag." R. 1026. Other testimony revealed that Ida Jean Shaw's yellow Buick had "an 18 tag." R. 1094-95. Contrary to respondent's assertion that "Petitioner was seen in a car near the scene of the murders," Resp. Br. 2, neither Mrs. Gibbs nor Mr. Davis could identify petitioner as the person she or he saw in a car near the Kersey home. R. 1038, 1039.

(iii) The third category of evidence touching on petitioner consisted of the testimony of Ida Jean Shaw.11/ First,

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11/ The prosecutor conceded to the jury that Ms. Shaw was herself a suspect in the Kersey affair. R. 1568. At trial, she repeatedly admitted actions that implicated her as at least an accessory after the fact. See A. 39-40; 399 So. 2d at 1365-66; R. 1213-14, 1232, 1238-39, 1249.

Ms. Shaw admittedly gave a number of inconsistent stories under oath before trial. A. 43; 399 So. 2d at 1367; see, e.g., R. 1208-09, 1225-26, 1233-35, 1257-59. As a result, she spent thirteen days in jail before trial on charges of perjury and was released by the State only after she agreed to repudiate certain prior sworn statements in which she exonerated petitioner and inculpated her daughter and two companions in the robbery and shooting. R. 272-74, 280-81, 1178-80, 1259, 1261, 1572. Ms. Shaw was called as a witness by the court because of her "hostility" to the State, and testified under a grant of immunity by the State from prosecution for murder, robbery and perjury. R. 103-06, 274, 281-82, 429-30, 1178-80, 1251-52. At trial, she admitted to having perjured herself again during the court's direct examination. Compare R. 1194, 1196 and R. 1205. As she summed it up: "Sometimes I just lie because I can." R. 1222. The version of Ms. Shaw's testimony reported here is the most damaging to petitioner.

Ms. Shaw testified that at about 7:55 a.m. on April 1, 1975, she was in the wash house when either Sampson or petitioner -- she could not remember which--informed her that Jeanette had been shot. R. 1187, 1188, 1212, 1224. Ten minutes earlier, the Armstrongs and petitioner had been gone, R. 1185-86, and Ms. Shaw testified that she did not "have any reason to believe that Jeanette, Earl and Sampson did not return together." R. 1212.

Next, Ms. Shaw testified that, while riding in a car with petitioner later that day, after Jeanette had confessed the robbery to her, she asked petitioner "[w]hy he did it," and he responded "that he had seed the man with money ... the time he ... went out there to buy a cow." R. 1205-06. When asked if she remembered at any time talking to petitioner about "whether he was inside that house or not,"

she answered, "No, because Jeanette had told me." R. 1206-07.[12/]

Finally, Ms. Shaw testified that, for a couple of days after April 1, 1975, petitioner hid either two or three guns in the loft of his house, and thereafter "Sampson and Earl" instructed Shaw "to get rid of all the guns." R. 1199-1200, 1201-02, 1231-32. She did so, first by burying them in her garden, and later by giving them to a friend in "a bucket of greens" with instructions "to get rid of [them]..," which he did. R. 1200, 1201-02, 1213, 1232, 1272-77.

* * *

12/ Jeanette Armstrong was tried separately, convicted of two counts of second-degree murder and one count of robbery, and sentenced to three consecutive life terms. See A. 51; 399 So. 2d at 1371. Her confessions to the police and to Ms. Shaw, stating that petitioner remained outside in the car during the robbery, are discussed in nn. 15-16, infra.

During petitioner's case, he admitted purchasing a cow from Mr. Kersey in March, but denied any knowledge of the robbery and shooting. R. 1500, 1509-11. He gave a minute-by-minute account of his activities on and around his farm on April 1, 1975. R. 1475-83.

Petitioner testified that he is a forty-three-year-old, partially disabled veteran with four children, ages one to eleven. R. 1467-68. He described his well-established ties to the community (including his ownership of a home and orchard) and his longstanding employment as a contract hauler and picking-crew chief. R. 1467-70.[13/]

13/ Fla. Stat. Ann. § 921.141(3) required the trial court to consider this mitigating evidence introduced at the guilt-innocence phase in passing sentence on petitioner. At the penalty phase, petitioner's counsel also argued that "very definite mitigating

In closing argument, the prosecutor acknowledged that the State's case did not provide "a clear and complete and accurate picture of what went on." R. 1558-59. In his view, however, the evidence demonstrated that "Jeanette Armstrong was there and that she got shot by Mrs. Kersey;" that "Sampson Armstrong killed the old people;" and that petitioner "was in that car between those two times." R. 1576-77.

Following the State's request for a "principal and accessory" instruction (R.

13/ continued

circumstance[s]" were present, including (1) the absence of any evidence "that Earl Enmund was at the house at the time of the shooting," and (2) that the killings were not "anticipated," but were the result of a "spontaneous gunfight" between the Armstrongs and the Kerseys which petitioner "could not be associated with." R. 1683-85. Respondent grossly misrepresents the record in asserting that petitioner "failed to present or proffer any evidence at all in mitigation." Resp. Br. 67 (emphasis in original).

1395, 1553), the trial judge twice charged the jury[14/] that "[t]he killing of a human being while engaged in the perpetration of ... robbery is murder in the first degree even though there is no premeditated design or intent to kill," and that the defendant could be convicted of first-degree murder if "the deceased was killed by ... someone acting in consort [sic] with the defendant." A. 6, 8, 15, 17. The jury subsequently announced identical verdicts as to Sampson Armstrong and petitioner: guilty of two counts of first-degree murder and one count of robbery. R. 1639, 1643, 1644-49.

2. The sentencing proceedings

At the sentencing phase of the trial,

14/ Three hours after the jury retired to deliberate the foreman requested, and the trial court provided, further instructions "[o]n the difference between first degree and second degree" murder. A. 13-19.

the State's only witness was Hardee County Sheriff Newton Murdock who testified that, because the two victims were advanced in years and a number of shots were fired, "this is the worse homicide I have been to involving two people." R. 1658-59. The State also introduced a judgment order showing that petitioner had been convicted in 1957 of robbery and sentenced to one year in jail. R. 1667; State's Sentencing Exhibit, No. 1.

In his closing argument on sentence, the prosecutor conceded that Sampson Armstrong was the "triggerman." He argued, however, that petitioner was "just as guilty as the triggerman," whether or not he "set foot inside that house," because he "set it all up ... [and] drove them there." R. 1679-80.

The trial judge directed the jurors to "determine by a majority vote whether or

not you advise the imposition of the death penalty" based upon "one, whether sufficient aggravating circumstances as hereafter enumerated existed to justify the death penalty; [and] two, whether sufficient mitigating circumstances exist as hereafter enumerated which outweigh the aggravating circumstances found to exist ...." A. 19. The instructions did not require the jury to find, as a precondition to imposition of the death penalty, that the defendant intended to take life, actually participated in a homicidal act, or was present when the homicide occurred.

The jury recommended imposing the death penalty on both defendants. A. 23-24; R. 1690-91. The trial court immediately sentenced petitioner and Sampson Armstrong to die on both counts of murder.[15/]

15/ Although the trial court heard no further evidence before reaching this

A. 27-28; R. 1698, 1701. In oral remarks prefacing petitioner's death sentence, the court found four aggravating circumstances in the case: "this capital felony was committed while the Defendant was engaged in or was an accomplice in the commission of ... a robbery; this capital felony was committed while the Defendant was engaged

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15/ continued

conclusion, it had an additional source of information before it that had not been introduced at trial: the full text of the sworn pretrial statements of Ida Jean Shaw. R. 283; see R. 1700. According to Ms. Shaw's statements: (1) Jeanette Armstrong told her that "We went out there to rob them, but weren't intending to have no shooting," May 5, 1975 statement, at p. 18, and that "we didn't know the man had a wife and he hollered and told his wife to bring the gun, and ... she started shooting and the bullet hit [Jeanette]," Aug. 19, 1975 statement, at p. 11; (2) Sampson Armstrong told her that "we went to rob them and had to kill them," May 5, 1975 statement, at p. 18; and (3) petitioner told her that "he took them out there and stayed in the car" and that he "was ... in the car the whole time," Aug. 19, 1975 statement, at pp. 18-19.

in or was an accomplice in the commission of ... a robbery; this capital felony was committed for pecuniary gain[;] ... this capital felony was especially heinous, atrocious, or cruel[; and] this Defendant ... had previously been convicted of a felony involving the use or threat of use of violence to a person." A. 28. The court found "no mitigating circumstances." A. 28.[16/]

16/ In both its oral sentencing opinions and its subsequent written findings (see the following paragraph of text), the trial court expressly stated that it was relying upon "the background of this Defendant based on the Court's participation in this trial and of [sic] the [separate] trial of one Jeanette Armstrong." A. 27, 31; see also R. 1697. Jeanette Armstrong's trial differed from petitioner's in that Jeanette Armstrong's written confession and portions of a transcript of tape-recorded admissions made by her just prior to her written statement (R. 298-355), were introduced at her trial, but not at petitioner's. R. 259-65, 328-29. The trial judge relied on these statements in sentencing petitioner even though, at a

The trial court did not file written findings of fact in support of the capital sentence -- as required by Fla. Stat. Ann. § 921.141 -- until nineteen months after petitioner's trial, when the Supreme Court of Florida ordered written findings in connection with petitioner's appeal. A. 29. The court again concluded that the four aggravating circumstances enumerated

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16/ continued

joint pretrial hearing, he forbade counsel for petitioner to cross-examine Ms. Armstrong concerning the statements, "because her confession would not be admissible in trial against your client." R. 328-29. Because the trial court considered Ms. Armstrong's statements, we note here that she told the police that Sampson and Jeanette Armstrong, alone, went up to the Kerseys' house because petitioner "wouldn't go no further. He stayed in the car." According to Jeanette, when she and Sampson were taking Mr. Kersey's wallet at gunpoint, Mr. Kersey called out to his wife to "shoot the nigger," and Mrs. Kersey thereupon fired "the first shot," striking Jeanette. State's Ex. 3, Aug. 11, 1975 (see R. 313, 354-55).

above were present in petitioner's case, and that "none of the statutory mitigating circumstances applied to this defendant."[17/] A. 30-32 (emphasis in original).

In support of its finding that the capital felony in petitioner's case was "especially heinous, atrocious or cruel," the trial court stated that the killing of Mr. and Mrs. Kersey "was not a spontaneous matter," but was done for the "purpose ... of eliminat[ing] ... witnesses to armed robbery." A. 30. The judge also stated that it was "reasonable to conclude, and

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17/ As in its instructions to the jury at the sentencing phase of the trial, in which the jury was told that the only mitigating circumstances it was to consider were those "hereafter enumerated" -- i.e., the seven specific circumstances enumerated "by Statute" -- A. 19-21, the trial court confined its discussion of mitigating circumstances exclusively to the seven "statutory" circumstances in Fla. Stat. Ann. § 921.141(6). A. 32.

the court so finds, that the defendant Enmund and the defendant Sampson Armstrong each fired into the bodies of Mr. and Mrs. Kersey." A. 31. However, in its findings directed to the "minor participation" mitigating circumstance of Fla. Stat. Ann. § 921.141(6)(d), the trial court abandoned the above-quoted statement and instead characterized petitioner as an "accomplice to the capital felony," whose participation was limited to before-the-fact planning of the robbery and the after-the-fact disposal of weapons. A. 32.

3. Proceedings on appeal

On appeal, the Supreme Court of Florida rejected the trial court's findings insofar as they assigned petitioner any role in the shooting of Mr. and Mrs.

Kersey.[18/] The Supreme Court expressly upheld petitioner's conviction of first-

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18/ The trial court based its conclusion that petitioner participated in the shooting on three factual premises: that both Kerseys were shot while in a "prone position;" that Jeanette Armstrong had previously "sustained serious wounds;" and that "different caliber guns" were used to kill the Kerseys. The first two premises are simply incorrect. As the Florida Supreme Court noted, the pathologist testified that "there is really no way [he] could determine the positions" of the victims when shot. A. 36; 399 So. 2d at 1364. The Court accordingly concluded that the evidence at trial "as to the direction of fire and the position of the victims when shot [was] ... equivocal at best." A. 55, 399 So. 2d at 1373, incorporating Armstrong v. State, supra, 399 So. 2d at 963; see also R. 1104-05, 1112, 1114. And there was no testimony at petitioner's trial concerning the severity of Jeanette Armstrong's wound.

More fundamentally, none of the trial judge's factual premises, even were they correct, contradict Sampson and Jeanette Armstrongs' separate admissions to both Jay B. Neal and Ida Jean Shaw that they alone went to the Kerseys home, or Sampson Armstrong's separate admissions to both Jay B. Neal and Ida Jean Shaw that he alone killed the victims after Mrs. Kersey fired on Jeanette. See Brief for Petitioner at 52 n.69.

degree murder and his sentence of death solely on a theory of accessorial liability based upon his participation in a robbery during which, and outside of petitioner's actual presence, Sampson Armstrong killed the Kerseys. The court found that "the only evidence of the degree of [Earl Enmund's] participation is the jury's likely inference that he was the person in the car by the side of the road near the scene of the crimes." It nonetheless concluded that this evidence

> was sufficient to find that the appellant was a principal of the second degree, constructively present [19/] aiding and abetting the commission

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19/ According to the court, one is "constructively present" if he does not commit the robbery "with his own hands" but is "'sufficiently near and so situated as to abet or encourage, or render assistance to the actual perpetrator in committing the felonious act or in escaping after its commission.'" A. 49; 399 So. 2d at 1370 (emphasis added).

> of the crime of robbery. This conclusion supports the verdicts of murder in the first degree on the basis of the felony murder portion of [Fla. Stat. Ann.] section 782.04 (1)(a).

A. 49-50; 399 So. 2d at 1370 (emphasis added).

Further, the Supreme Court expressly disapproved two of the four aggravating circumstances on which the trial court had relied. The court first held that the "pecuniary gain" circumstance could not be relied upon in addition to the robbery-murder aggravating circumstance. A. 55; 399 So. 2d at 1373. It then rejected the trial court's conclusion that the capital felony was "especially heinous, atrocious or cruel," together with the factual findings on which that conclusion had rested. It found that "the shootings were ... spontaneous and were precipitated by the armed resistance of Mrs. Kersey,"

and that "[i]t simply cannot be said that there was proof that the robbers killed in order to assure that there would be no witnesses against them." A. 55; 339 So. 2d at 1373, incorporating Armstrong v. State, 399 So. 2d 953, 963 (Fla. 1981).

Despite its repudiation of two of the trial court's aggravating-circumstance conclusions and several of the trial court's factual predicates for petitioner's sentence of death, the Supreme Court upheld that sentence on the ground that there were two remaining aggravating circumstances (the commission of a homicide "in the course of a robbery," and petitioner's "previous conviction of a violent felony" -- the 1957 robbery for which he received a one-year sentence) and, in the court's view, no mitigating circumstances. A. 55;

399 So. 2d at 1373.[20/]

Finally, the Supreme Court of Florida rejected petitioner's claim that "the trial court erred in sentencing appellant to death where the evidence failed to show he actually caused the death of the victims, or intended to cause their death, and at best showed appellant minimally involved in the felony-murder." Supplemental Brief of Appellant, at 7-12. The Court held:

> Appellant contends that since the evidence does not establish that he intended to take life the death penalty is impermissible under the eighth amendment ban on cruel

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20/ Justice Overton dissented. In his opinion, the court's "finding" that petitioner "did not actually participate in the shooting" so substantially undermined the trial court's premise for sentencing petitioner to die -- i.e., that petitioner "was present and assisted in the commission of the murder" -- that resentencing was necessary. A. 56; 399 So. 2d at 1373. See Petr. Br. 53.

> and unusual punishment. Appellant offers us no binding legal authority that directly supports this proposition, and we therefore reject it.

A. 51; 399 So. 2d at 1371.

CONCLUSION

On this record, petitioner's death sentence cannot constitutionally be sustained. The judgment of the Supreme Court of Florida, insofar as it leaves the sentence of death undisturbed, should be reversed.

Respectfully submitted,

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APPENDIX

In footnote 10 on page 49 of its brief, respondent states:

> Of the sixty-six inmates awaiting execution at Florida State Prison whose death sentences have been affirmed by the Florida Supreme Court, forty-five (68%) were involved in the commission of underlying felonies when homicides occurred. See Appendix.

To assist the Court to examine the 45 "felony-murder context" (Resp. Br. 49) cases cited by respondent from a perspective that bears meaningfully on the issues in the present case, we divide those 45 cases into 3 categories below: In the first category are those 36 of the 45 "felony-murder context" cases in which the Florida Supreme Court either found or affirmed a trial court or jury finding that the defendant intended life to be taken. In the second category, are the 8 "felony-

murder context" cases in which the Florida Supreme Court has not passed one way or the other on the question of intent. In the last category, is the one "felony-murder context" case -- petitioner's -- in which the Florida Supreme Court did not make a finding of an intent to kill and affirmed the sentence of death despite its assumption that no such finding could be made on the record before it.

I. Florida "Felony-Murder Context" Cases Involving Findings That The Defendant Intended to Take Life

Alvord v. State, 322 So. 2d 533, 540 (Fla. 1975) ("cold, calculated design to kill")

Booker v. State, 397 So. 2d 910, 917 (Fla. 1981) (defendant killed "for the purpose of avoiding arrest")

Brown v. State, 381 So. 2d 690, 695 (Fla. 1980) ("premeditated design to effect death")

Buford v. State, 403 So. 2d 943, 949 (Fla. 1981) ("premeditation")

Clark v. State, 379 So. 2d 79, 104 (Fla. 1979) ("intent to eliminate a witness")

Combs v. State, 403 So. 2d 418, 421 (Fla. 1976) ("cold, calculated and premeditated" killing)

Cooper v. State, 336 So. 2d 1133, 1140 (Fla. 1976) (defendant killed "for the purpose of avoiding arrest")

Darden v. State, 329 So. 2d 287, 288 (Fla. 1976) ("assault with intent to commit murder" against second victim in same transaction as first victim was killed)

Elledge v. State, 346 So. 2d 998, 1000-01 (Fla. 1977) (defendant killed "for the purpose of avoid-arrest")

Ford v. State, 374 So. 2d 496, 502, 503 (Fla. 1979) (same)

Foster v. State, 369 So. 2d 928 (Fla. 1979) (defendant convicted of "premeditated murder")

Francois v. State, Case No. 54,461 (Fla. opinion filed Oct. 15, 1981) (defendant was "the actual perpetrator of five premeditated murders")

Funchess v. State, 341 So. 2d 762, 763 (Fla. 1977) ("premeditated")

Goode v. State, 365 So. 2d 381, 384 (Fla. 1978) ("plan to kill")

Hall v. State, 403 So. 2d 1231, 1323 (Fla. 1981) (defendant convicted of premeditated murder)

Hargrave v. State, 366 So. 2d 1, 2, 3 (Fla. 1978) ("deliberate" taking of life)

Henry v. State, 328 So. 2d 430, 431 (Fla. 1976) ("premeditated design")

Jackson (Carl) v. State, 359 So. 2d 1190, 1194 n.3 (Fla. 1978) (defendant killed "for the purpose of avoiding arrest")

Jackson (Ronald) v. State, 366 So. 2d 752, 756 (Fla. 1978) ("intention ... to eliminate and execute the witness to the robbery")

Jacobs v. State, 396 So. 2d 1113, 1118 (Fla. 1981) (defendant killed "for the purpose of avoiding arrest")

Jent v. State, Case No. 58,744 (Fla. opinion filed Dec. 3, 1981) ("premeditated murder")

Johnson v. State, 393 So. 2d 1069, 1073 (Fla. 1981) (life taken "cooly and with calculation")

King v. State, 390 So. 2d 315 (Fla. 1980) (similar to Darden, supra)

Knight v. State, 338 So. 2d 201, 202 (Fla. 1976) (defendant killed "for the purpose of avoiding arrest")

Meeks v. State, 339 So. 2d 186, 190 (Fla. 1976) (same)

Mikenas v. State, Case No. 49, 928 (Fla., opinion filed Nov. 5, 1981) (same)

Proffitt v. State, 315 So. 2d 461, 466 (Fla. 1975) ("premeditated design")

Raulerson v. State, 358 So. 2d 828, 834 (Fla. 1978) (defendant killed "for the purpose of avoiding arrest")

Ruffin v. State, 397 So. 2d 277 (Fla. 1981) (same as Hall, supra)

Sireci v. State, 399 So. 2d 964, 971 (Fla. 1981) (defendant took life "for the purpose of avoiding arrest")

Smith v. State, 365 So. 2d 704, 708 (Fla. 1978) ("design" to take life)

Sullivan v. State, 303 So. 2d 632, 637 (Fla. 1974) (Overton, J., concurring) (defendant "fully intended to murder the victim")

Thompson v. State, 389 So. 2d 197, 198 (Fla. 1980) ("torture murder")

Vaught v. State, Case No. 52,835 (Fla., opinion filed Jan 7, 1982) (defendant took life "for the purpose of avoiding arrest")

Washington v. State, 362 So. 2d 658 662-66 (Fla. 1978) (same)

White v. State, 403 So. 2d 331, 337-38 (Fla. 1981) (same)

II. Florida "Felony-Murder Context" Cases in Which There Was No Determination One Way or the Other By the Florida Supreme Court as to Whether the Defendant Intended to Take Life

Adams v. State, 341 So. 2d 765 (Fla. 1977) (defendant was triggerman)

Aldridge v. State, 351 So. 2d 942 (Fla. 1977) (defendant was triggerman)

Armstrong v. State, 399 So. 2d 953 (Fla. 1981) (defendant was triggerman)

LeDuc v. State, 365 So. 2d 149 (Fla. 1978) (defendant was triggerman)

McCrae v. State, 395 So. 2d 137 (Fla. 1976) (defendant was triggerman)

Peek v. State, 395 So. 2d 492 (Fla. 1980) (defendant was triggerman)

Shriner v. State, 386 So. 2d 525 (Fla. 1980) (defendant was triggerman)

III. Florida "Felony-Murder Context" In Which Florida Supreme Court Assumed that an Intent to Kill Could Not Be Found On the Record

Enmund v. State, 399 So. 2d 1362, 1371 (Fla. 1981)

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

EARL ENMUND, :

Petitioner, : No. 81-5321

vs. :

STATE OF FLORIDA, :

Respondent. :

MOTION TO STRIKE PORTIONS OF PETITIONER'S REPLY BRIEF

Comes now Respondent, State of Florida, represented by the undersigned counsel and requests this Court to strike portions of Petitioner's Reply Brief.

This case is scheduled for oral argument on March 23, 1982. Petitioner has filed a Reply Brief in which he purports to "set the record straight." (Reply Brief for Petitioner, page 17). However, Petitioner has included direct quotations from several pretrial statements which, although available to the trial court, were not made part of the record on appeal and were not considered by the Supreme Court of Florida and are not part of the record currently before this Court.

Under Florida law, depositions and other statements which have not been filed in the lower tribunal are not made part of the record on appeal unless such inclusion is specifically requested. See Fla.R.App.P. 9.200(a)(1). No such request was made by Petitioner, and under Florida law it is his burden and responsibility to perfect the record on appeal.

Petitioner has used the information which was not available to the Florida Supreme Court to demonstrate his alleged lack of involvement in the crimes for which he was

convicted. Thus, this information is potentially relevant to the issue before the Court, and Respondent has been unable to refute Petitioner's contentions because of time constraints and the unavailability of an opportunity to file a subsequent brief. Petitioner should not be permitted to attempt to demonstrate how the Florida Supreme Court erred by citing to this Court information which Petitioner did not make available to the Supreme Court of Florida.

Specifically, Respondent requests that the portions of footnotes 15 and 16 which make reference to statements not found in the record before this Court be struck. Counsel for Respondent, before filing this Motion, attempted to resolve the problem with Petitioner's counsel. Petitioner's counsel declined to take any action on the matter. The Court should be informed that the objectionable material was selectively taken from statements which Respondent could use to support his argument had those statements been part of the record on appeal which was considered by the Supreme Court of Florida.

WHEREFORE, Respondent respectfully requests that portions of Petitioner's Reply Brief which cite to matters which were unavailable to the Supreme Court of Florida be struck.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Strike Portions of Petitioner's Reply Brief has been forwarded to William C. McLain, Assistant Public Defender, Hall of Justice Annes, 495 N. Carpenter Street, Bartow Florida 33830, this 18th day of March, 1982.

George R. Georgieff

GEORGE R. GEORGIEFF
Assistant Deputy Attorney General

COUNSEL FOR RESPONDENT

Office - Supreme Court, U.S.
FILED
FEB 1 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-5321

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v.

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ON WRIT OF CERTIORARI TO THE FLORIDA SUPREME COURT

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No. 81-5321

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INTEREST OF AMICI CURIAE

The above-listed states, through their respective Attorneys General, respectfully offer this brief as amici curiae in support of the respondent, the State of Florida. The amici curiae, as does Florida, have death penalty statutes permitting the imposition of capital punishment upon a finding of one or more specified aggravating circumstances, and the lack of mitigating circumstances substantial enough to merit leniency. It is inevitable that the precise issue before this Court will arise in the jurisdictions represented by the amici curiae. Therefore, the amici curiae have a profound and continuing interest in the resolution of the issue before the Court.

SUMMARY OF ARGUMENT

The language of this Court's decision in *Coker v. Georgia*, 443 U.S. 584 (1977), indicates unresolved tension between two incompatible theories of punishment: utilitarianism and retributivism, especially as the latter theory finds expression in the principle of proportionality. The utilitarian approach, though superficially humane and relied on in scattered instances by members of the Court, is defective for several reasons: (1) it does not coincide with ordinary perceptions of justice, which include proportionality between the offense committed and the penalty incurred; (2) it is destructive of human dignity by making people mere means to ends; and (3) the Constitution itself, including the Eighth Amendment as interpreted by this Court, is based upon natural law rather than utilitarianism and incorporates the retributivist proportionality principle. Proportionality of punishment therefore is the superior approach, whether viewed morally, logically, or constitutionally.

In applying the proportionality principle, what truly is proportional must be determined by objective rather than subjective criteria. However, the Court's previous mode of analysis, which relies on the three elements of history/precedent, legislative attitudes, and jury decisions, is less than satisfactory. Therefore, two factors should be examined: the nature of the crime and the character of the criminal. Analysis of the nature of felony murder reveals that this Court has already established a "bright line" between cases where the victim has lived and those where he was killed. That same line should apply fully in all situations. Where a person dies in the course of a felony in which the defendant knowingly and willingly participated, the death penalty should always be available. Analysis of the character of the offender and his degree of participation

insures true proportionality by allowing mitigation of the death penalty when appropriate under the circumstances. This Court has already adopted essentially this approach in *Coker v. Georgia* with *Lockett v. Ohio*, 438 U.S. 586 (1978).

ARGUMENT

IN ORDER TO PROPERLY SERVE THE PRINCIPLE OF PROPORTIONALITY, WHICH IS BOTH THE ESSENCE OF CRIMINAL JUSTICE AND THE ONLY DEFENSIBLE EXPRESSION OF THE EIGHTH AMENDMENT PROHIBITION OF EXCESSIVE PENALTIES, THE DEATH PENALTY SHOULD BE AVAILABLE IN FELONY MURDER CASES.

A. *Introduction.* Petitioner Enmund asserts that his sentence of death for a felony murder is "excessive" and therefore unconstitutional. (Pet. Brief at 7.) The primary basis for his claim is the holding of *Coker v. Georgia*, 433 U.S. 584 (1977), and the following language from that case:

> [A] punishment is "excessive" and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground.

433 U.S. at 592. Respondent, the State of Florida, takes the contrary view, and this Amici Curiae Brief is submitted in support of Florida's position. It is the view of Amici that the language of *Coker*, supra, demonstrates an unresolved tension within the Court between two theories of punishment. That tension impedes clear analysis of Eighth Amendment issues. One of these approaches is logically and morally better than the other, and provides a sounder sny-

thesis of this Court's prior Eighth Amendment decisions. The better theory fully supports imposition of the death penalty in some felony murder cases, while minimizing the likelihood that it will be imposed unjustly.

B. *Two theories of punishment: utilitarianism v. retributivism.* The language from *Coker* quoted above seeks to join together what are really two incompatible philosophies of punishment. The first alternative, whether a punishment "makes no measurable contribution to acceptable goals of punishment" so as not to needlessly impose suffering, is meaningful only if we know what are the "acceptable goals" of punishment. The meaning of "acceptable goals" apparently is to be found in *Furman v. Georgia*, 408 U.S. 238 (1972), *Robinson v. California*, 370 U.S. 660 (1962), *Trop v. Dulles*, 356 U.S. 86 (1958), and *Weems v. United States*, 217 U.S. 349 (1910), because the language from *Coker* being analyzed immediately follows a statement that this Court had "firmly embraced the holdings and dicta" of those cases that the Eighth Amendment bars "excessive" as well as "barbaric" punishments. Justice Brennan's concurring opinion in *Trop v. Dulles* includes a straight-forward declaration about what are the acceptable goals of punishment:

> In recent years we have seen such devices as indeterminate sentences and parole added to the traditional term of imprisonment. Such penal methods seek to achieve the end, at once more humane and effective, that society should make every effort to *rehabilitate* the offender and restore him as a useful member of that society as society's own best protection. Of course, rehabilitation is *but one* of the several purposes of the penal law. Among other purposes are deterrence of the wrongful act by the threat of punishment and insulation of society from dangerous individuals by imprisonment or execution.

356 U.S. at 111. This statement is essentially "utilitarian" in its approach.

> The utilitarian theory of punishment can be summarized in three propositions . . . According to this theory:
>
> 1. Social utility (correction, prevention, deterrence, etcetera) is a necessary condition for justified punishment.
>
> 2. Social utility is a sufficient condition for justified punishment.
>
> 3. The proper amount of punishment to be inflicted upon the offender is that amount which will do the most good or the least harm to all those who will be affected by it.[1]

These utilitarian sentiments find some parallel in others of the quartet of cases on which *Coker* relies. In *Weems v. United States*, supra, the holding that the "cadena temporal" was an unconstitutional punishment for false official record entries was supported by a statement, remarking of a lesser penalty, "The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal." 217 U.S. at 381. Justice Marshall's concurring opinion in *Furman v. Georgia* specifically relied on this *Weems* language and Justice Brennan's *Trop v. Dulles* opinion did the same in formulating a list of rational goals for the death penalty, which were then analyzed to determine whether they were sufficiently fulfilled to justify the penalty. See 408 U.S. at 342-359. Justice Marshall unhesitatingly rejected retribution (treated as a synonym for "retaliation" and "vengeance") as an acceptable goal of punishment.

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[1] J. FEINBERG AND H. GROSS, PHILOSOPHY OF LAW 504 (footnotes omitted) (1975) (hereinafter FEINBERG & GROSS).

The utilitarian approach is, however, far from holding complete sway, either in the realm of this Court's opinions[2] or on the broader philosophical battlefield. The opposing viewpoint is generally known as "retributivism," and has been summarized as espousing the following:

1. Moral guilt is a necessary condition for justified punishment.
2. Moral guilt is a sufficient condition ("irrespective of consequences") for justified punishment.
3. The proper amount of punishment to be inflicted upon the morally guilty offender is that amount which fits, matches, or is proportionate to the moral gravity of the offense.[3]

It is here that we begin to see the tension present in *Coker's* alternative theories of Eighth Amendment excessivity: the utilitarians, like Justice Marshall, reject retribution as an "acceptable goal of punishment," and *Coker's* first alternative is essentially utilitarian, but one of the essential elements of retributivism is its demand for proportionality between the crime and the punishment, and *Coker's* second alternative explicity adopts a principle of proportionality. It is obvious that no consistent decision-making process will be possible so long as the Court is compelled to rely on two principles which are polar opposites.

Before attempting to resolve the conflict, it must be pointed out that retributivism, particularly as presented in the principle of proportionality, cannot be written off as easily as Justice Marshall sought to do in his *Furman* opinion. Indeed, it can be quite reasonably argued that the idea of proportionality, which is inextricably bound up with retributivism, contains the very essence of justice in a criminal law context. Criminal justice seems at the very

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[2] In *Furman*, supra, Chief Justice Burger, joined by Justices Blackmun, Powell, and Rehnquist, strongly disagreed with the proposition that retribution is not an acceptable rationale for punishment. 408 U.S. at 394-95. See also Justice Powell's dissent at 452-54.

[3] FEINBERG & GROSS, supra, at Note 1, at 502.

least to mean receiving what punishment one deserves, and not receiving punishment one does not deserve. On the one hand, we intuitively find it unfair for an innocent person to be punished at all. On the other hand, it strikes us as being wrong that the guilty should not be punished, or that they be punished without some reasonable correlation between the offense and the penalty. We revolt at the thought of capital punishment for parking violations, and we find nearly as repugnant the idea of punishing murder with a $5 fine.

Thus, our most basic instincts about criminal justice include a principle of proportionality of punishment. This principle of proportionality has been repeatedly advocated throughout history. A very early example is the Biblical directive found in Exodus 21:23-24:[4]

> But if there is any further injury, then you shall appoint as a penalty life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise.

See also Leviticus 24:17-21 and Deuteronomy 19:21. While this "lex talionis" has often been castigated for harshness, the fact is that it was a significant amelioration of the pre-Mosaic pattern of unrestrained personal revenge and blood feud.[5] Moreover, the principle of proportionality cannot be dismissed as being merely the view of religious adherents, because very similar concepts have found expression

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[4] All Bible quotations are from the New American Standard translation (NASB).

[5] H. Daniel-Rops, Daily Life in the Time of Jesus 174 (O'Brian tr., 1962). Compare the clear proportionality of this Mosaic arrangement with the cruel excessiveness displayed in Lamech's boast in Genesis 4:23-24: "For I have killed a man for wounding me; And a boy for striking me; If Cain is avenged sevenfold, Then Lamech seventy-sevenfold."

over thousands of years in the writings of distinguished secular thinkers who arrived at their conclusions from varied philosophical approaches. Examples include Aristotle,[6] Justinian,[7] and Immanuel Kant.[8]

C. *Proportionality is logically, morally, and constitutionally superior to utilitarianism.* Thus, the principle of proportionality derives from a long and respectable philosophical tradition. At the same time, it must be understood that the utilitarian approach to punishment suffers from some very grave defects, which have been succinctly stated as follows (referring to the three theses of utilitarianism quoted previously):

> Thesis 2, ... is the utilitarian's greatest embarrassment. His retributivist opponent argues forcefully against it that in certain easily imaginable circumstances it would justify punishment of the (legally) innocent, a consequence which all would regard as a moral abomination. Some utilitarians deny that punishment of the innocent could ever be the alternative that has the best consequences in social utility, but this reply seems arbitrary and dogmatic. Other utilitarians claim that "punishment of the innocent" is self-contradiction. The concept of punishment, they argue, itself implies hard treatment imposed upon the guilty as a conscious and deliberate response to their guilt. ... H.L.A. Hart calls this move a "definitional

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[6] ARISTOTLE, THE NICHOMACHEAN ETHICS, Book V.

[7] Justice is "the constant and perpetual disposition to render every man his due." *Institutes*, Book 1, Title 1, pr.

[8] IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 101-02 (Ladd Trans., 1965) (hereinafter "KANT"): "What kind and what degree of punishment does public legal justice adopt as its principle and standard? None other than the principle of equality (illustrated by the pointer on the scales of justice), that is, the principle of not treating one side more favorably than the other. Accordingly, any undeserved evil that you inflict on someone else among the people is one that you do to yourself. If you vilify him, you vilify yourself; if you steal from him, you steal from yourself; if you kill him, you kill yourself. Only the Law of retribution (jus talionis) can determine exactly the kind and degree of punishment ....

> stop, " and charges that it is an "abuse of definition," and indeed it is, if put forward by a proponent of the general utilitarian theory. If the right act in all contexts is the one which is likely to have the best consequences, then conceivably the act of framing an innocent man could sometimes be right; and the question of whether such mistreatment of the innocent party could properly be called "punishment" is a mere question of words having no bearing on the utilitarian's embarrassment. . . .
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> No kind of utilitarian, however, will have plausible recourse to the definitional stop in defending thesis 3 from the retributivist charge that it would, in certain easily imaginable circumstances, justify excessive and/or insufficient penalties. . . . And yet, if these were the penalties likely to have the best effects generally, the utilitarian in the theory of punishment would be committed to their support.[9]

Consideration of these general faults in the theory demonstrates that the "acceptable goals" of punishment of a utilitarian are not nearly so acceptable as they may first appear. For example, various members of this Court have written with great force and eloquence about how the Eighth Amendment protects the fundamental dignity of all men, even criminals. See Chief Justice Warren's opinion in *Trop v. Dulles*, 356 U.S. at 100, Justice Brennan's concurrence in *Furman v. Georgia*, 408 U.S. at 270-80, and Justice Marshall's dissent in *Gregg v. Georgia*, 428 U.S. 153, 240 (1976). What greater loss of dignity, what clearer instance of making convicted defendants "objects to be toyed with and discarded"[10] can there be than to say with the utilitarian, "We can do with you whatever we will, regardless of your individual moral desert, for the greater good of society"? Yet this is precisely what happens when we look at general deterrence as a primary reason for punishment.

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[9] FEINBERG & GROSS, (supra at Note 1), at 504-05.

[10] *Furman v. Georgia*, 408 U.S. at 273 (Brennan, J., concurring).

> Retributive punishment actually puts human dignity on a high level. The theory which teaches that punishment merely is expedient and useful, degrades human nature. When justice is at the basis of penalty, man is treated in dignity, as a person. However, if the public good is the basis, he is treated as a means to an end. Man has free choice and responsibility, and punishment based on this assumption honors man for what he really is. Responsibility is at the basis of all punishment, and any failure to recognize this degrades human personality.[11]

Another example may be found when we speak of rehabilitation as our primary objective. While this sounds more benign because more individually oriented, it, too, is flawed. H.L.A. Hart has cogently argued that, to make rehabilitation ("reform" in Hart's terminology) the object of punishment, is actually to distort the fundamental purposes of the criminal law:

> There is indeed a paradox in asserting that Reform should 'predominate' in a system of Criminal Law, as if the main purpose of providing punishment for murder was to reform the murderer, not to prevent murder .... The objection to assigning to Reform this place in punishment is not merely that punishment entails suffering and Reform does not; but that Reform is

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[11] W. Baker, Worthy of Death 94 (1973). *See also* Kant, supra note 8, at 100: "Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or for civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else and can never be confused with the objects of the law of things. His innate personality (that is, his right as a person) protects him against such treatment, even though he may indeed be condemned to lose his civil personality. He must first be found to be deserving of punishment before any consideration is given to the utility of this punishment for himself or for his fellow citizens. The law concerning punishment is a categorical imperative, and woe to him who rummages around in the winding paths of a theory of happiness looking for some advantage to be gained by releasing the criminal from punishment or by reducing the amount of it. . . ."

> essentially a remedial step for which *ex hypothesi* there is an opportunity only at the point where the criminal law has failed in its primary task of securing society from the evil which breach of the law involves.[12]

Moreover, as Herbert Morris has demonstrated in convincing detail, "The logic of sickness [which underlies a rehabilitative ideal] implies the logic of therapy," the end result of which is to deprive criminals of the inalienable human dignity that gives them a right to be punished rather than "treated."[13]

Therefore, before we even turn to the Constitution, logic and morality teach us that retributivism, expressed in the principle of proportionality, is superior to utilitarianism as a rationale for punishment. The Constitution supports the same conclusion. Those supporting retributivism have generally been classed as belonging to the "natural law" philosophical tradition.[14] The Constitution itself is a product of the natural law philosophy.

> [W]hatever the historical obscurities which surround the proposal and adoption of the Bill of Rights, there is little question that the Bill was part of and gives expression to a developing moral theory regarding the moral rights of human beings which had been theoretically stated by Milton and Locke and which was being given or was to be given expression by Rousseau and

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[12] H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, reprinted in PUNISHMENT AND RESPONSIBILITY – ESSAYS IN THE PHILOSOPHY OF LAW 26-27 (1968).

[13] Morris, *Persons and Punishment*, THE MONIST 52:4 (Oct. 1968), reprinted in FEINBERG & GROSS, supra, at 572-85.

[14] *Cf.* D.A.J. RICHARDS, THE MORAL CRITICISM OF LAW 8-10, 230-31 (1977) (hereinafter RICHARDS).

> Kant. The founding fathers believe some such theory. . . . The choice to adopt or reject such a theory is not an open question in the United States; it is part of the warp and woof of the constitutional design.[15]

> This being so, it is not surprising that the Constitution contains provisions that accord with a retributivist theory of punishment, but which do not jibe with utilitarianism. One clear example appears in the prohibition on bills of attainder.[16]

It is therefore altogether proper that the principle of proportionality has always played a predominant role in this Court's analysis of Eighth Amendment questions. The first detailed examination of the prohibition of cruel and unusual punishments is *Weems v. United States*, supra. There the majority opinion, authored by Justice McKenna, framed the issued by describing the penalty of "cadena temporal" for a false entry in the public record and then asking,

> Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, *and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense.*

Is this also a precept of the fundamental law?

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[15] *Id.* at 44-45 (footnotes omitted); cf. Barker, *Natural Law and English Positivism*, from TRADITIONS OF CIVILITY (1948), reprinted in FEINBERG & GROSS, supra, at 14-15.

[16] RICHARDS, supra, (at Note 14), at 232-33. The manner in which attainder affected innocent persons is indicated in *Furman v. Georgia*, 408 U.S. 317, Fn.8 (Justice Marshall concurring). See also Deuteronomy 24:16, "Fathers shall not be put to death for their sons, nor shall sons be put to death for their fathers; everyone shall be put to death for his own sin."

217 U.S. 366-67 (emphasis added). The Court's answer was yes, the punishment was so disproportionate to the crime that it offended the Eighth Amendment. The holding of the case was that the principle of proportionality is the standard by which the Eighth Amendment measures excessiveness of penalties. That cannot be doubted, particularly after reading Justice White's dissent, the whole focus of which is on precisely that point. (See 217 U.S. at 382-413.) *See also, Rummel v. Estelle*, 445 U.S. 263, 272-74, 289-90 (1980).

The principle of proportionality seems also to have compelled the decision in *Robinson v. California*, 370 U.S. 660 (1962), where the defendant was in effect punished for being a drug addict. Here was disproportion at its greatest — punishment for what properly considered was no crime at all. "To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold." 370 U.S. at 667.[11] Indeed, four members of the Court have explicitly characterized *Robinson* as an expression of the proportionality principle. See Chief Justice Burger's dissent in *Furman v. Georgia*, 408 U.S. at 393 n.18. Further, Chief Justice Warren stated in *Trop v. Dulles* that "Fines, imprisonment and even execution may be imposed *depending upon the enormity of the crime* ...." 356 U.S. at 100 (emphasis added).

It appears that the principle of proportionality has (rightfully) also begun to predominate over utilitarianism in the current Court's analysis of Eighth Amendment questions. This is suggested particularly by Footnote 4 to the majority opinion in *Coker v. Georgia*, where it is flatly

[11] See also Justice Douglas' concurring opinion where he specifically relies on the fact that "a punishment out of all proportion to the offense may bring it within the ban against 'cruel and unusual punishments.'" 370 U.S. at 676.

stated that "Because the death sentence is a disproportionate punishment for rape, it is cruel and unusual punishment within the meaning of the Eighth Amendment *even though it may measurably serve the legitimate ends of punishment* and therefore is not invalid for its failure to do so." 433 U.S. at 592-93 (emphasis added).[13] Moreover, every sitting Justice (except Justice O'Connor, who has not yet had occasion to express herself on an excessiveness question) has given substantial assent to the principle of proportionality, though disagreements have arisen about what the proper proportion was in particular cases. *See Coker v. Georgia*, 433 U.S. at 584 (opinion of White, J., joined by Stewart, Blackmun, Stevens, JJ.; opinion of Powell, J.); *Furman v. Georgia*, 408 U.S. at 279-80 (Brennan, J., concurring), 408 U.S. at 331-32 (Marshall, J., concurring), and 408 U.S. at 393 (Burger, C.J., dissenting, joined by Blackmun, Powell and Rehnquist, JJ.); *Rummel v. Estelle*, 445 U.S. at 271-74, n.11 (opinion of Rehnquist, J., joined in by Stewart, White, Blackmun, JJ., and by Burger, C.J.). Therefore, application of a principle of proportionality accords with the better part of this Court's prior practice, as well as with what is expressed by the Constitution itself, and is the logically and morally superior approach.

D. *The proportionality and constitutional validity of particular penalties should be determined by analysis of the nature of the crime and the character of the offender.* This Court has rightfully sought in past Eighth Amendment cases to base its determinations on objective factors rather than the subjective views of its members. Unfortunately, this has resulted in an almost mechanical mode of analysis based on the three elements of history and precedent, legislative attitudes, and the sentencing decisions of juries. *See, e.g., Gregg v. Georgia* and *Coker v. Georgia*,

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[13] Even Justices Brennan and Marshall have acknowledged that even useful or "necessary" punishments can be unconstitutional because of severity. See *Furman v. Georgia*, 408 U.S. at 281 n.26 (Brennan, J., concurring); 408 U.S. at 355-56 (Marshall, J., concurring).

supra. While this method does have some value, it suffers from two major defects. The first problem is the danger of cutting the principle of proportionality adrift from its philosophical underpinnings. The essence of the natural law tradition on which the principle of proportionality is based is that "positive law" — human statutes and legal decisions — is valid only insofar as it reflects higher, immutable concepts of justice. Thus, Nazi enactments were certainly "law" in the sense of being enforceable rules of conduct, and may even have in some instances reflected a concensus of the population, but because of their gross immorality, we deny them validity. While a coalescence of history and precedent, legislative action, and jury actions presumably tends, by the breadth of the sources drawn upon, to illuminate the substance of immutable justice in a particular situation, it does not *necessarily* do so, and hence cannot be given absolutely determinative weight.

Secondly, it cannot be ignored that this Court's own decision-making has substantially altered what other courts, legislatures, and juries are able to do (or at least, perceive themselves as being able to do). For example, although before *Furman v. Georgia* the decision whether death should be imposed was left to the untrammeled discretion of juries, it is now necessarily channeled in certain ways, and in a significant number of states is not done by the jury at all, but by the judge. The value of jury decisions as an indicator of what immutable justice is, as distinguished from what the latest pronouncement of this Court is, has therefore been materially altered. These changes have also been extremely rapid; as several members of the Court have themselves pointed out, new decisions about the death penalty have come in such quick succession that the legislative processes have not really had opportunity to function and to provide accurate material for analysis. *Coker v. Georgia*,

433 U.S. at 613-19 (Burger, C.J., dissenting, joined by Rehnquist, J.); cf. *Roberts v. Louisiana*, 428 U.S. 325, 362 (1976) (White, J., dissenting).

This is not to say, however, that the Court is left without any method for determining questions of proportionality. First, the essence of proportionality is a correlation between the *offense* and the punishment. In the context of the present case, this Court has already drawn a logical "bright line," both implicitly and explicitly, that can be stated briefly—"Death is different." The uniqueness of death as a penalty for crime has been repeatedly noted by this Court, in *Furman* and subsequent cases. Implicit in those comments, however, is the recognition that death is unique for *everyone*, criminal and victim alike. Once it occurs, there is no turning back. Just as this Court has accorded special concern to defendants subject to the death penalty, likewise a special opprobrium and penalty logically should apply to cases where a death, the victim's, has already occurred. This implicit logic was made explicit in *Coker v. Georgia:*

> Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which "is unique in its severity and irrevocability," *Gregg v. Georgia*, 428 U.S., at 187, is an excessive penalty for the rapist who, as such, does not take human life.

433 U.S. at 598. Where death has been inflicted within the context of the felony-murder situation, proportionality demands that death be available as punishment.[19]

Two objections will immediately be raised: first, that this is a retreat to the rule of lex talionis, which (even if an improvement over prior practice) is generally viewed as being mechanical and therefore susceptible to being unduly severe; second, that if such a principle is firmly installed in Eighth Amendment jurisprudence, it will prove unworkable, because there are too many crimes for which sanctions of a "similar" character simply could not be imposed. Both objections can be answered in the same response: accepting the principle of *proportionality* does not require adopting a doctrine of precise *equivalency*. Proportionality is roughly served so long as death for death is *possible*, but is most truly served when the character of the *offender* as well as the *offense* is given consideration; indeed, it hardly makes sense to talk about making punishment proportional to personal desert unless the character of the offender is weighed. *Roberts v. Louisiana*, 431 U.S. 633 (1977); *Woodson v. North Carolina*, 428 U.S. 280 (1976). Once we are removed from the acceptedly unique situation of a crime involving a death, we may legitimately leave it to the body responsible for policy decisions, the legislature, to determine what constitutes true proportionality for each type of crime that is committed.

Both of these positions are in accord with decisions already made by this Court. That the death penalty is constitutionally permissible in felony-murder cases, so long as any matters related to either the crime itself or to the character and participation of the defendant are admitted to be considered as mitigation, is implicit in the various

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[19] KANT, supra at Note 8, at 102: "There is no sameness of kind between death and remaining alive even under the most miserable conditions, and consequently there is also no equality between the crime and the retribution unless the [murderer] is judicially condemned and put to death."

opinions in *Lockett v. Ohio*, 438 U.S. 586 (1978). Justice White argued that death was a disproportionately severe punishment "without a finding that the defendant possessed a purpose to cause the death of the victim." 438 U.S. at 624. In doing so he stood alone. A six member majority of the Court refused to hold that execution could never be imposed for felony murder. Justice Rehnquist flatly rejected the results of Justice White's proportionality analysis. 438 U.S. at 635-36. The plurality opinion, authored by Chief Justice Burger and joined in by Justices Stewart, Powell, and Stevens, emphasized that the felony-murder doctrine itself was constitutionally inoffensive:

> That states have authority to make aiders and abettors equally responsible, as a matter of law, with principals, or to enact felony murder statutes is beyond constitutional challenge.

438 U.S. at 602. They did hold that degree of participation in the crime had to be *considered* in assessing punishment, but nowhere in the opinion is there any suggestion that death may not be appropriate, even for a felony-murder, if the mitigating effect of minimal participation or lack of specific murderous intent is out-weighed by sufficiently cogent aggravating factors.

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a *mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

438 U.S. at 604 (emphasis original, footnotes omitted).

> [A] statute that prevents the sentencer in all capital cases from giving independent *mitigating* weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation

> creates the risk that the death penalty will be imposed in spite of factors which *may call* for a less severe penalty.

438 U.S. at 605 (emphasis added). Justice Blackmun likewise rejected any absolute prohibition on the use of the death penalty based upon proportionality analysis. 431 U.S. at 613-14. Instead, he too would have the circumstances of the crime weighed in mitigation, the outcome to be determined by the cumulative impact of all the factors, both mitigating and aggravating, relevant to sentencing:

> The more manageable alternative, in my view, is to follow a proceduralist track, and require, as Ohio does not, in the case of a nontriggerman such as Lockett, that the sentencing authority have discretion to consider the degree of the defendant's participation in the acts leading to the homicide and the character of the defendant's mens rea. That approach does not interfere with the State's individual statutory categories for assessing legal liability but merely requires that the sentencing authority be permitted to weigh any available evidence, adduced at trial or at the sentencing hearing, concerning the defendant's degree of participation in the homicide and the nature of his mens rea in regard to the commission of the homicidal act. A defendant would be permitted to adduce evidence, if any be available, that he had little or no reason to anticipate that a gun would be fired, or that he played only a minor part in the course of events leading to the use of fatal force.

438 U.S. at 615-16. It therefore appears that, while degree of participation and other circumstances of the crime must be taken into account as mitigating factors, the existence of such factors does not dictate that capital punishment may never be imposed. Such circumstances must simply be added to the sentencing calculus, the outcome being determined by the impact of all sanction-relevant variables. Consequently, the Court appears to have drawn a sharp distinction between the "bright line" of *Coker*, where no death

has occurred, and the "factual line" of *Lockett*, where criminal activity has caused a death, but the sentencer may still take into account all possible mitigating factors.

The second proposition, that outside of the line between death and non-death situations the line-drawing properly rests with the legislatures, is the specific holding of *Rummel v. Estelle*, 445 U.S. at 274-75, 283-84.

Retributivism, given substance in the principle of proportionality, is the only philosophy of punishment that succeeds in being consistent with logic, morality, and the terms of the Constitution, as well as providing a reasonable synthesis of this Court's previous Eighth Amendment decisions. That approach satisfies all reasonable demands because it both allows for a unique sanction proportionate to the unique offense, death for death, if that is appropriate, and also provides for the mitigation of that sanction if justified by circumstances. To say that death may *never* be imposed in felony murder situations destroys proportionality as much as saying it must *always* be applied. The "availability cum opportunity to mitigate" scheme is the only one truly consistent with the Constitution.

E. *The peculiarities of some felony murder situations do not require that the death penalty be rendered unavailable in all felony murder situations.* Several considerations have been raised in Petitioner's Brief that he claims require that the death penalty be found unconstitutional in felony murder cases. The first such claim is that, because he did not personally kill the victims or intend their deaths, he is really no different from any ordinary robber, or a rapist like Coker, so that death would be a disproportionately heavy sentence. However, the felony-murderer *is* different from Coker and other "ordinary" felons in one obvious way — somebody *died* as a result of criminal activity in which he was a participant. Petitioner evidently would have us ignore resultant harm and assess criminal liability on the basis of intent alone, but this proves too much. If intent alone establishes culpability, we not only must cease imposing

lighter punishments for attempts than for consummated crimes, we must begin punishing mere wicked thoughts. This Court has, in the past, treated resultant harm as a legitimate consideration in the Eighth Amendment cases. For example, in *Weems v. United States*, the Court compared Weems' offense to a Federal embezzlement statute and concluded,

> In other words, the highest punishment possible for a crime which may cause the loss of many thousand of dollars, and to prevent which the duty of the State should be as eager as to prevent the perversion of truth in a public document, is not greater than that which may be imposed for falsifying a single item of a public account. And this contrast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual.

217 U.S. at 381. If a relative lack of resultant harm can render a punitive statute disproportionately severe and unconstitutional, by the same token a greater harm done implies the propriety of greater punishment. This thought is present in *Coker v. Georgia* itself: rape is bad, but not as harmful as murder, so it should be punished less. The result for the murder victim is equally bad whether he is intentionally killed or "felony murdered" — he is dead, and his death is the result of criminal activity. To say that degree of harm should not be considered is to make victims, who have done nothing, "objects to be toyed with and discarded". Victims, too, have a right to human dignity, to preservation from arbitrary, socially unacceptable, and often torturous deaths; "our concern for human life must not be confined to the guilty". *Coker v. Georgia*, 433 U.S. at 616 (Burger, C.J., dissenting).

Another point that needs to be made is that this Court need not accept at face value the statements that Petitioner "did not cause death," and "did not intend death to occur." Causation is an extremely complex concept; Hart and Honore spend well over 400 pages exploring its

ramifications.[20] The thing that must be understood is that physical causation (e.g., who pulled the trigger) does not exhaust legal causation; the law makes persons responsible for many things they do not directly and physically cause to happen. Therefore, for Petitioner to say that he did not "cause" the deaths of the Kerseys because he (arguendo) was not the triggerman, is really to beg the question. The proper inquiry is whether the law holds Petitioner responsible and liable for what involvement he did have in the crime, and the answer plainly is yes. As previously noted, *Lockett v. Ohio* found felony-murder doctrine constitutionally permissible. This Court has also addressed "vicarious" liability at length in the context of holding conspirators responsible for the substantive crimes of their coconspirators, and found nothing wrong with it:

> We have here a continuous conspiracy. There is here no evidence of the affirmative action on the part of Daniel which is necessary to establish his withdrawal from it. *Hyper v. United States*, 225 U.S. 347, 369. As stated in that case, "Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law. As the offense has not been terminated or accomplished he is still offending. And we think, consciously offending, offending as certainly, as we have said, as at the first moment of his confederation, and consciously through every moment of its existence." *Id.*, p.369. And so long as the partnership in crime continues, the partners act for each other in carrying it forward. It is settled that "an overt act of one partner may be the act of all without any new agreement specifically directed to that act." *United States v. Kissel* 218 U.S. 601, 608. Motive or intent may be proved by the acts or declarations of some of the conspirators in furtherance of the common objective. *Wiborg v. United States*, 163 U.S. 632, 657-658. . . . The govern-

[20] H.L.A. HART and A.M. HONORE, CAUSATION IN THE LAW (1959).

ing principle is the same when the substantive offense is committed by one of the conspirators in furtherance of the unlawful project. *Johnson v. United States*, 62 F.2d 32, 34. The criminal intent to do the act is established by the formation of the conspiracy. Each conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act done was in execution of the enterprise. The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle. That principle is recognized in the law of conspiracy when the overt act of one partner in crime is attributable to all. . . .

A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement. But as we read this record, that is not this case.

Pinkerton v. United States, 328 U.S. at 646-48 (1946).

This brings us to the question of intent. Petitioner would have this Court require active premeditation before the death penalty could be imposed, but this particular "bright line" is far too restrictive. While mental states are typically labelled as falling within one of four distinct catagories — purposely doing an act, knowingly doing it, recklessly doing it, or negligently doing it — it is obvious that these are nothing more than handy benchmarks on an infinitely graded continuum, which at their edges merge into one another like colors in the spectrum. What moral distinction is there to be drawn between one who specifically purposes the death of another in the course of a robbery, one who knows that the robbery will result in the death of another without purposing it, and one who willingly participates in an armed robbery which creates a grave foreseeable risk of death? In each instance a death occurs as the result of

criminal action in which the defendant participated, and would not have occurred if the crime had not been committed. Anyone who knowingly creates a substantial risk of death to another is in effect saying, "I don't know for certain that anyone will be killed if this crime I plan to participate in is carried out, but I am willing that someone should die." If he were not willing, he would avoid it by not participating. Again, the victim is just as dead whether his death was purposed or resulted from an avoidable and illegitimate risk, the commission of a potentially violent crime.

> There is a sense in which life is always endangered by sexual attack, just as there is a sense in which it is always endangered by robbery, or by burglary of a dwelling, or by any physical assault. The threat of violence is not the less a threat for being conditional, and violence always carries the possibility of a fatal outcome.[21]

It is therefore just as proper to say that one who "felony murdered" through risk creation was at fault for the death, as it is to say that one who premeditatedly murdered was at fault for the death, and they should be treated similarly. The death penalty should be available,[22] but the decision whether death should actually be imposed left to the fully informed, properly channeled discretion of the sentencing authority, giving due consideration to the defendant's degree of involvement and intent. Any other resolution defies the Constitution as previously interpreted, as well as general principles of logic and morality.

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[21] Parker, *Making the Punishment Fit the Crime*, 77 HARV.L.REV. 1071, 1077 (1964).

[22] See Exodus 21:28-29: "And if an ox gores a man or a woman to death, the ox shall surely be stoned and its flesh shall not be eaten; but the owner of the ox shall go unpunished.

If, however, an ox was previously in the habit of goring, and its owner has been warned, yet he does not confine it, and it kills a man or a woman, the ox shall be stoned and its owner also shall be put to death."

Respectfully submitted,

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No. 81-5321

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

EARL ENMUND,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

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QUESTION PRESENTED

Whether the Eighth and Fourteenth Amendments allow a criminal to avoid a capital sentence imposed under constitutionally valid State laws when he has planned and participated in a violent crime, supplied at least one of the deadly weapons used to execute the crime, and disposed of the weapons in an attempt to avoid detection after two brutal murders occurred as the natural and probable consequence of his criminal plan?

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IN THE

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EARL ENMUND,

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STATE OF FLORIDA,

Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

INTERESTS OF *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION

The Washington Legal Foundation (WLF or Foundation) is a non-profit corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in matters affecting the broad public interest. WLF has more than 80,000 members and supporters throughout the United States whose interests the Foundation represents.

WLF participates and devotes a substantial portion of its resources to matters raising criminal justice and related constitutional issues. The Foundation's concern for

the physical, psychological, and financial impact crime has on its victims, their families, and society has led to the establishment of a Crime Victims Program. This program is designed to advance the rights of crime victims and to help reduce the alarming crime rate in America. Among other activities, WLF provides educational materials, legal guidance, and assistance to the victims of violent crime, participates in rulemaking proceedings before such agencies as the United States Parole Commission, and monitors criminal cases in which the courts have been too lenient in sentencing violent criminals or otherwise exhibited an insensitivity to the rights of victims and the general public.

In the instant case, the Washington Legal Foundation seeks to advance the interests of its members and the public by urging this Court to consider the right and the need of the States and their elected representatives to protect law-abiding citizens from murders and other acts of violence which often lead to murder. The States have a paramount right to determine their individual criminal justice needs and how to best meet those needs without undue interference from Federal Courts.

The Washington Legal Foundation has appeared before this Court as *amicus curiae* on numerous occasions. Briefs *amicus curiae* have been filed with and accepted by the Supreme Court in the following recent cases: *Zant v. Stephens*, No. 81-89 (brief filed November 19, 1981); *Murphy v. Hunt*, No. 80-2165 (brief filed November 19, 1981); *General Bldg. Contractors Assn. v. Commonwealth of Pennsylvania*, No. 81-280, 330-33 (brief filed December 3, 1981; *Eddings v. Oklahoma*, No. 80-5727 (brief filed August 12, 1981); *Edwards v. United States*, No. 81-5017 (brief filed September 2, 1981); *Williams v. Zbaraz*, 448 U.S. 358 (1980); *Consolidated Edison Co. of New York v. Public Service Commission of the State of New York*, 447 U.S. 530 (1980); *United Steel Workers v. Weber*,

443 U.S. 193 (1979); *Carbon Fuels Company v. United Mine Workers*, 442 U.S. 939 (1979); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 322 (1979); *Parklane Hosiery Co. v. Shore*, 439 U.S. 323 (1979); *Federal Trade Commission v. Standard Oil Co. of California*, 449 U.S. 232 (1980); *San Diego Gas and Electric Co. v. City of San Diego*, —— U.S. ——, 101 S.Ct. 1287 (1981); *Rostker v. Goldberg*, —— U.S. ——, 101 S.Ct. 2646 (1981); *Moody v. Forresster*, —— U.S. ——, 101 S.Ct. 1733 (1981); *First National Maintenance Corp v. NLRB*, —— U.S. ——, 101 S.Ct. 1510 (1981).

The Washington Legal Foundation can bring a perspective to this case which will assist the Court in obtaining full consideration of the public interest issues. WLF seeks to insure that the arguments in favor of capital punishment—which we submit more accurately reflect the real public interest since they consider the rights of *all* citizens, not just criminals—are advanced before this Court. Such a function is particularly important when, as here, a criminal who was a prime mover in a violent crime which foreseeably resulted in a brutal double murder seeks to avoid moral culpability and criminal responsibility. Petitioner asks this Court to override the authority of the State to determine the appropriate punishment for his crime as well as to substitute its personal judgment on factual matters for that of the courts and jury below. Such interference will only serve to undermine the rightful authority of the States and the confidence of the public in the criminal justice system.

STATEMENT OF THE CASE

In the interests of judicial economy, *amicus curiae*, Washington Legal Foundation, adopts for the most part the recitation of facts in the Florida Supreme Court's decision in *Enmund v. Florida*, 399 So.2d 1362, 1363-67 (1981). However, it is useful to briefly recount the facts

which are particularly material to the substantive issue at bar.

On the morning of April 1, 1975, the bullet-riddled bodies of Thomas and Eunice Kersey were found on the floor of their Florida home by their daughter. Mr. Kersey had been shot twice, while Mrs. Kersey had been shot six times.

A chain of evidence linked Petitioner, Earl Enmund, his common law wife, his son-in-law and his daughter-in-law to the crime. The evidence indicated that shortly before the murders, Petitioner and a friend bought a calf from Mr. Kersey who indiscriminately showed his wallet to Earl Enmund. According to testimony by Petitioner's wife, Enmund decided to plan to rob Mr. Kersey after seeing his money.

Further evidence adduced at trial demonstrated that a careful ruse for gaining access to the Kerseys' home was devised. It included the use of two deadly firearms. While the trial court found that it was reasonable to conclude that Enmund had fired into the bodies of the Kerseys, the Supreme Court of Florida ruled that no direct evidence was introduced at trial to show that Enmund had done so.

After the murders, Enmund instructed his wife to remove a .22 caliber pistol from a hiding place in their house. The pistol had formerly been in the glove compartment of the car identified as that driven to the robbery by Petitioner. Petitioner and his son-in-law instructed Enmund's wife to get rid of the guns since they had been used to kill Mr. and Mrs. Kersey.

At trial, Petitioner claimed he was innocent of robbing and murdering the Kerseys. Nonetheless, he and his son-in-law were tried and convicted of first degree murder and robbery. Pursuant to Florida law, evidence was heard on the sentencing issue and a sentence of death was recommended. The trial court specifically considered seven

mitigating circumstances, including Petitioner's degree of participation in the crime, and concluded they were outweighed by the aggravating circumstances present in the case.

The Florida Supreme Court reviewed a variety of claims advanced by Petitioner on appeal. The court concluded after independently examining all of the evidence that Petitioner's participation in the crime was "major" and that his conviction and sentence were correct under well-established Florida law.

SUMMARY OF ARGUMENT

Petitioner's capital sentence is neither excessive nor disproportionate under the Eighth and Fourteenth Amendments. Nothing in this Court's prior jurisprudence supports Petitioner's argument that a death sentence may not be constitutionally imposed in *any* felony murder case absent a finding of specific intent to kill. Since the jury and courts below considered all of the circumstances of the homicidal act and of Enmund's role in the felony in making their sentencing decision, Petitioner was treated as a unique individual in accordance with this Court's prior mandates. Thus, Petitioner's sentence must be affirmed even if individual members of this Court disagree with the assessment of the evidence reached below.

Petitioner would have this Court believe that an affirmance of the Florida court's decision would automatically mean that *all* participants in a felony murder, regardless of their intent or role in the crime, would receive capital punishment. The fact is that the Florida law expressly allows as a mitigating factor for capital punishment an accomplice's "relatively minor" participation in the felony. Fla. Stat. Ann. § 921.141(6)(d).

Petitioner, however, played a *major* role in the deaths of the Kerseys. His attorneys' characterization of his

conduct ("unintentional" and "lacking moral culpability") and the Kerseys' deaths ("spontaneous" and "fortuitous") are merely false premises for a syllogism designed to remove Petitioner's sentence from the bounds of constitutionality. No doubt, the squeezing of a trigger and the resulting high velocity of the bullet takes only a fraction of a second. But to so characterize the physics of a shooting as "spontaneous"—a characterization upon which so much of Petitioner's argument hinges—would be to remove all killings by guns and other highly efficient weapons which produce spontaneous deaths from the imposition of capital punishment for any felony murder. It would also ignore the underlying calculations made by Enmund and other such participants which clearly evidence an intent to allow a killing to occur or to facilitate such a foreseeable outcome. In essence, acceptance of Petitioner's argument requires a nullification of common law principles of criminal responsibility developed over hundreds of years and forces this Court to don the mantle of both legislature and jury in reaching that decision.

Moreover, Petitioner's sentence accords with present societal standards of decency. "Decency" is not synonomous with leniency and the imposition of a capital sentence is not an indication of societal deterioration. All objective indicia demonstrate that society accepts the imposition of capital punishment in appropriate cases of felony murder. Even the legal authority relied upon by Petitioner indicates that his sentence is constitutionally valid. In addition, imposition of capital punishment in appropriate felony murder cases serves both a deterrent and retributive function.

Accordingly, Petitioner's arguments must be rejected.

ARGUMENT

I. A CAPITAL SENTENCE MAY BE PROPERLY IMPOSED FOR FELONY MURDER UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS WITHOUT BEING DISPROPORTIONATE OR EXCESSIVE.

Petitioner's elaborately constructed argument for avoiding his properly imposed capital sentence lacks merit. Under the Eighth and Fourteenth Amendments, "a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering, or (2) is grossly out of proportion to the severity of the crime." *Coker v. Georgia*, 433 U.S. 584, 592 (1977). Accord, *Gregg v. Georgia*, 428 U.S. 153, 173 (1976). The essence of Petitioner's argument is that a capital sentence is unconstitutionally excessive and disproportionate for *any* felony murder conviction absent a finding of specific intent (in the literal sense) to kill. He further contends that he bears no greater moral culpability for his crime in which two deaths occurred than does any other violent criminal in a case in which no death occurred. Petitioner's argument does not withstand analysis.

Nothing in this Court's prior jurisprudence supports reading a specific intent requirement into the Eighth Amendment. The jury and courts below considered all of the evidence of the circumstances of the homicidal act and of Petitioner's character in making their sentencing decision. Therefore, Petitioner was treated as a "unique" individual in accordance with the principles previously announced by this Court. *See Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, No. 80-5727, slip op., (U.S. Sup. Ct. Jan. 19, 1982). Petitioner's characterization of his conduct and the Kerseys' murders are merely premises for a syllogism designed to remove this case from the ambit of principles previously announced by this

Court. Petitioner had a guiding hand in the murder of Thomas and Eunice Kersey. Accordingly, he bears moral and legal responsibility for his criminal actions. His sentence is neither disproportionate nor excessive; it accords with societal standards of decency and serves acceptable criminal punishment goals of society. Hence, the sentence imposed upon Earl Enmund by the Florida jury and courts must be affirmed.

A. Reading A Specific Intent Requirement Into The Eighth Amendment Is Inconsistent With Prevoius Decisions Of This Court.

The State of Florida's felony murder-capital punishment statutory scheme is constitutional as applied to Petitioner, Earl Enmund. His argument—that a capital sentence is *always* unconstitutionally disproportionate to a felony murder conviction, absent a finding of active premeditated specific intent to kill—is not supportable. Rather, an examination of the pertinent decisions demonstrates that the Florida sentencing procedure, which provided for particularized consideration of the circumstances of the homicidal act and the character of the accused, comported with all of the requirements for imposing a valid capital sentence mandated by this Court.

This Court has recognized that it "has never articulated a general constitutional doctrine of *mens rea*." *Powell v. Texas*, 392 U.S. 514, 535 (1968). Rather, it has relied upon "[t]raditional common-law concepts of personal accountability . . ." on the grounds that "[w]e cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his anti-social deeds." [footnote omitted] *Id.* at 535-36.

In *Lockett v. Ohio*, *supra*, this Court considered the validity of a capital sentence for an accomplice in an armed robbery which resulted in a death. Without reaching the question presently at bar, a plurality of this Court held that:

> [T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

438 U.S. at 604 (emphasis in original).

Since the Ohio statute under review permitted consideration of *only* three mitigating circumstances, the statute was unconstitutional. Significantly, the Ohio statute, unlike the Florida statute here, did not permit consideration of individualized circumstances such as the defendant's minor or major role in the offense or age. *Id.* at 606-608. Consideration of those and other mitigating factors are mandated in Florida, see Fla. Stat. Ann. § 921.141(6)(a)-(g), and were in fact considered in the instant case. *Enmund v. Florida*, *supra*, 399 So.2d at 1372-73.

The result is that Petitioner's sentence is not flawed by any of the "constitutional infirmities" found to exist in the sentences in *Lockett*, 438 U.S. at 606-07, or in *Eddings v. Oklahoma*, No. 80-5727, *supra*, slip op. at 8-10. The Florida sentencing authority fully explored the record and weighed any mitigating circumstances. That individual members of this Court might disagree with the weight given the evidence by the courts below does not justify overturning a valid sentence. As Chief Justice Burger recently stated:

> [T]he Constitution does not authorize us to determine whether sentences imposed by state courts are sentences we consider "appropriate"; our only authority is to decide whether they are constitutional under the Eighth Amendment.

Eddings, *supra*, slip op. at 9 (Burger, C.J., dissenting). *See Hutto v. Davis*, No. 81-23 (U.S. Sup. Ct. Jan. 11, 1982).

Justice White filed a separate opinion in *Lockett* in which he urged "that it violates the Eighth Amendment to impose the penalty of death without a finding that the

defendant possessed a purpose to cause the death of the victim." 438 U.S. at 624 (White, J., concurring in part, concurring in judgment, dissenting in part). While the opinion of the plurality in *Lockett* did not find it necessary to reach that question, *id.* at 609 n.16, both Justice Rehnquist and Justice Blackmun addressed the same issue and rejected the proposition advanced by Justice White and by Petitioner here.

Justice Rehnquist stated that:

> I finally reject the proposition urged by my Brother White in his separate opinion, which the plurality finds it unnecessary to reach. That claim is that the death penalty, as applied to one who participated in this murder as Lockett did, is "disproportionate" and therefore violative of the Eighth and Fourteenth Amendments. I know of no principle embodied in those Amendments, other than perhaps one's personal notion of what is a fitting punishment for a crime, which would allow this Court to hold the death penalty imposed upon her unconstitutional because under the judge's charge to the jury the latter were not required to find that she intended to cause the death of her victim. As my Brother White concedes, approximately half of the States "have not legislatively foreclosed the possibility of imposing the death penalty upon those who do not intend to cause death." Ante, at 625, 57 L.Ed.2d, at 1002. Centuries of common law doctrine establishing the felony-murder doctrine, dealing with the relationship between aiders and abettors and principals, would have to be rejected to adopt this view. Just as surely as many thoughtful moralists and penologists would reject the Biblical notion of "an eye for an eye, a tooth for a tooth," as a guide for minimum sentencing, there is nothing in the prohibition against cruel and unusual punishments contained in the Eighth Amendment which sets that injunction as a limitation on the maximum sentence which society may impose.

Id. at 635-36 (Rehnquist, J., dissenting).

Similarly, Justice Blackmun, concurring in part and in the judgment, refused to embrace in *Lockett* the "bright

line" argument now urged by Petitioner. Rather, in terms which are consistent with *Powell, supra*, and instructive here, Justice Blackmun rejected the proposition that capital punishment may never be imposed for felony murder after examining the jurisprudential and practical difficulties of such a rule:

> I do not find entirely convincing the disproportionality rule embraced by my Brother White. *The rule that a defendant must have had actual intent to kill, in order to be capitally sentenced, does not explain why such intent is the sole criterion of culpability for Eighth Amendment purposes.* What if a defendant personally commits the act proximately causing death by pointing a loaded gun at the robbery victim, verbally threatens to use fatal force, admittedly does not intend to cause a death, yet knowingly creates a high probability that the gun will discharge accidentally? What if a robbery participant, in order to avoid capture or even for wanton sport, personally and deliberately uses grave physical force with conscious intent to inflict serious bodily harm, but not to kill, and a death results? *May we as judges say that for Eighth Amendment purposes the absence of a "conscious purpose of producing death"* [citation omitted] *transforms the culpability of those defendants' actions?*
>
> *Applying a requirement of actual intent to kill to defendants not immediately involved in the physical act causing death, moreover, would run aground on intricate definitional problems attending a felony murder.* What intention may a State attribute to a robbery participant who sits in the getaway car, knows that a loaded gun will be brandished by his companion in the robbery inside the store, is willing to have the gun fired if necessary to make an escape but not to accomplish the robbery, when the victim is shot by the companion even though not necessary for escape? What if the unarmed participant stands immediately inside the store as a lookout, intends that a loaded gun merely be brandished, but never bothered to discuss with the triggerman what lim-

itations were appropriate for the firing of the gun? What if the same lookout personally intended that the gun never be fired, but, after his companion fires a fatal shot to prevent the victim from sounding an alarm, approves and takes off?

> *The requirement of the actual intent to kill in order to inflict the death penalty would require this Court to impose upon the States an elaborate "constitutionalized" definition of the requisite mens rea, involving myriad problems of line drawing that normally are left to jury discretion but that, in disproportionality analysis, have to be decided as issues of law, and interfering with the substantive categories of the States' criminal law.* And such a rule, even if workable, is an incomplete method of ascertaining culpability for Eighth Amendment purposes, which necessarily is a more subtle mixture of action, inaction, and degrees of mens rea.

438 U.S. at 614-15 n.2 (Blackmun, J., concurring in part and concurring in judgment) (emphasis added).

Justice Blackmun's assessment of the difficulties of a bright line rule requiring specific intent led him to the conclusion, also reached implicitly by the plurality, that:

> *The more manageable alternative,* in my view, *is to follow a proceduralist tack, and require,* as Ohio does not, in the case of a nontrigger man such as Lockett, *that the sentencing authority have discretion to consider the degree of the defendant's participation in the acts leading to the homicide and the character of the defendant's mens rea.* That approach does not interfere with the State's individual statutory categories for assessing legal liability but merely requires that the sentencing authority be permitted to weigh any available evidence, adduced at trial or at the sentencing hearing, concerning the defendant's degree of participation in the homicide and the nature of his mens rea in regard to the commission of the homicidal act. A defendant would be permitted to adduce evidence, if any be available, that he had little or no reason to anticipate that a gun would be fired, or that he played only a minor part

> in the course of events leading to the use of fatal force.

438 U.S. at 615-16 (emphasis added).

Thus, it is implicit in the various opinions in *Lockett* that a capital sentence is constitutionally valid in felony murder cases as long as any mitigating factors related to the crime itself or the individual defendant may be admitted for consideration of the appropriate sentence. Such a conclusion comports with this Court's Eighth Amendment jurisprudence which has consistently focused upon individual culpability as demonstrated by the characteristics of the particular offense and the particular offender. *See e.g., Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts (Harry) v. Louisiana*, 431 U.S. 633 (1977); *Coker v. Georgia*, 433 U.S. 584 (1977).

Florida's felony murder-capital punishment statutory scheme fits within this constitutional framework. As stated by the *Lockett* Court:

> That states have authority to make aiders and abettors equally responsible, as a matter of law, with principals, or to enact felony murder statutes is beyond constitutional challenge.

438 U.S. at 602.

Moreover the constitutional validity of Florida's procedure for imposing capital punishment was approved in *Proffit v. Florida*, 428 U.S. 424 (1976). In the context of the case at bar, the procedure employed in sentencing Petitioner passes constitutional muster since it provides for particularized consideration of the homicidal act and of Earl Enmund's character. Both channels of inquiry were explored below thereby assuring that Petitioner's sentence was not arbitrarily or harshly imposed. Petitioner's sentence is constitutionally valid notwithstanding his attempt to read a specific intent requirement into the Eighth Amendment. Any other conclusion intimates a rejection of the capital sentencing principles previously laid down by this Court.

B. Accepting Petitioner's Characterization Of His Conduct And The Kerseys' Murders Requires The Nullification Of Common Law Principles Of Criminal Responsibility Developed Over Hundreds Of Years.

Acceptance of Petitioner's claims would not only require another reinterpretation or rejection of the principles previously announced by this Court in death penalty cases, but the nullification of common law principles of criminal responsibility developed over hundreds of years. Since such a decision would place this Court in the position of both a super-legislature and a super-jury as well as deny the States the practical ability to decide criminal matters of State concern, the public interest demands that Petitioner's attempts to avoid his sentence be rejected.

Petitioner's characterization of the Kerseys' murders and his role in them has a surreal quality. Throughout his brief, Petitioner repeatedly denies "individual and personal culpability" for the deaths of the Kerseys which are characterized as a mere "spontaneous" "fortuity". Brief of Pet. at 9, 14, 37.[1] Petitioner argues that "he did not . . . intend to take life, or contemplate that it would be taken by another." Hence, his guilt is "technical" and he cannot be subject to a capital sentence.

The Washington Legal Foundation submits that Petitioner's contentions have no merit and only serve to highlight the moral frame of reference he brings to this case. To say that one may conspire with others to rob an elderly couple, go about the commission of that robbery armed with deadly weapons, and yet escape liability for any

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[1] Note that Petitioner does reluctantly admit at one point in his comparison of the enormity of his crime to that of Ehrlich Coker's that:

> Coker and petitioner both committed serious felonies that do not contemplate the taking of human life. *Both thereby created a risk . . . that by setting in train a series of events, the death of another person might result.* Fortunately, in Coker's case the risk did not materialize. In petitioner's case it did.

Brief of Pet. at 17 (emphasis added).

ensuing deaths is to view the victims as mere "objects to be toyed with and discarded." *Coker v. Georgia*, 433 U.S. at 616 (Burger, C.J., dissenting).

Our system of justice has always been grounded in individual responsibility. Responsibility and moral culpability extend to situations in which an individual has played an integral role in creating a situation in which violence may occur, supplied the means for the violence to occur, and then enjoyed the illegal fruits of the violence once it has occurred. In brief, one is presumed to intend the natural, reasonable, and probable consequences of his voluntary acts including a criminal enterprise in which he is the guiding hand.

To claim, then, as Petitioner does, that such an individual bears no moral culpability for the foreseeable result of his conduct turns our traditional concepts of criminal responsibility on their head. Petitioner fails to differentiate legal intent and legal causation from their literal and physical meanings.

Even a superficial examination of his arguments demonstrates that they are merely the necessary premises for a syllogism designed to bring his case within the constitutional ambit of *Coker v. Georgia*, *supra*. In essence, Petitioner is stating: "Since I did not physically cause death, I cannot be sentenced to death myself." However, Petitioner ignores the fundamental difference between his case and Coker's; death occurred here. That it does not always occur when a risk is created is not constitutionally significant in cases in which it does.

Enmund's repeated reference to the murders of Thomas and Eunice Kersey as a mere "fortuity" is a ghoulish insult to their memory. The murders of Mr. and Mrs. Kersey were no "fortuity"; they were the direct and foreseeable result of a plan to commit robbery with loaded firearms. Petitioner decided to rob Mr. Kersey at the time he purchased the calf from him. All he needed was help in carrying out his plan. Earl Enmund wanted Tom Kersey's money and was prepared to get it at any cost.

Any cost, that is, short of bearing legal responsibility for his illegal conduct.

The fact of the matter is that the Kerseys are dead. The State of Florida may therefore sentence Petitioner to death since it complied with the guidelines set forth by this Court in its previous capital decisions. That the State has discretion to include capital punishment as a potential penalty for felony murder should be beyond question. If the question is open at all, it is only open to the legislatures of the various States as this Court has repeatedly recognized. A bright line distinction to the contrary by this Court will deny the States their rightful authority and ability to protect their citizens.

C. Petitioner's Sentence Accords With Societal Standards Of Decency.

Petitioner's sentence accords with "the evolving standards of decency which mark the progress of a maturing society." *Gregg v. Georgia*, 428 U.S. 153, 190 (1976); *quoting Witherspoon v. Illinois*, 391 U.S. 510 n.15 (1968), and *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *Coker, supra*, 433 U.S. at 603 (Powell, J., concurring). As an initial matter, it must be noted that invocation of the phrase "evolving standards of decency" does not automatically imply a departure from utilizing capital punishment. An examination of a number of relevant factors indicates that societal standards comprehend the imposition of capital punishment for felony murder. Capital punishment has been traditionally available in all appropriate cases including felony murder cases. Surprisingly, the authority cited by Petitioner to support his case buttresses the conclusion that his sentence is constitutionally valid. Hence, prohibiting capital punishment in all felony murder cases does not accord with society's evolving standards of decency.

1. *The phrase "evolving standards of decency" does not automatically imply a departure from imposing capital sentences.*

It is important to state at the outset, however obvious the proposition may seem, that invocation of the concept of "evolving standards of decency" does not automatically imply a departure from imposing capital sentences. "Decency" is not synonomous with leniency and an increased use of capital sentences is not synonomous with societal deterioration. In fact, the Washington Legal Foundation submits the opposite is true.

In his brief, Petitioner adopts a tone of moral superiority that admits no doubt that the standards of our mature society have evolved such that the only "decent" course available is to prohibit capital sentences for criminals like Enmund. WLF is not surprised that Petitioner strikes this false note of "victimization," but this Court should reject that notion. It has become increasingly common in our society for criminals to reverse the roles and claim themselves the "victim" and society the "criminal" responsible for their illegal acts. That Petitioner can make such a claim at all with a reasonable hope that it will be favorably received by this or any other court demonstrates the extent to which the focus of the criminal justice system has been distorted. WLF submits that while our society may not believe that *all* major felonies, standing alone, justify a capital sentence, it is not true that our society will become "more decent" if this Court abolishes the *potential* for a death sentence in all cases in which a felony results in death.

2. *Objective indicia indicate that society accepts capital punishment for felony murder in appropriate cases.*

Objective indicia of societal standards do not reveal a rejection of capital sentences for all cases of felony murder. Rather, they indicate that a large segment of society has concluded that capital punishment is necessary under certain circumstances.

Amicus submits that contemporary attitudes toward capital punishment clearly support the affirmance of Petitioner's sentence. Thirty-seven (37) State legislatures, the bodies "constituted to respond to the will and consequently the moral values of the people," have enacted capital punishment statutes since this Court's decision in *Furman v. Georgia*, 408 U.S. 238, 383 (Burger, C.J., dissenting) (1972). *See National Law Journal*, "Death Row Census Growing as Legal Challenges Continue," January 18, 1982 at 4, col. 2. While Petitioner contends that only eight (8) jurisdictions join Florida in expressly permitting a capital sentence in cases such as the instant one, Justices White, Blackmun, and Rehnquist all noted in *Lockett, supra*, that "approximately half of the States 'have not legislatively foreclosed the possibility of imposing the death penalty upon one who did not intend to cause death.'" 438 U.S. at 635. Yet, there are indications that twenty-six (26) States by actual count allow a capital sentence for an aider and abettor without proof of specific intent to cause the murder. *See* Brief of Respondent at ——. Thus, contemporary legislative judgments do not demonstrate the type of mass rejection of capital punishment for felony murder which would justify this Court's interference.

Similarly, Petitioner's reliance on a variety of statistics relating to jury determinations is sorely misplaced. The statistics submitted by Petitioner bring to mind a statement attributed to Benjamin Disraeli: "There are three kinds of lies in this world: lies, damned lies and statistics."

Like Justice Blackmun in *Lockett, supra*, *Amicus*

> must question the data relied upon by my Brother White [and offered again in the instant case, as it was in *Lockett*, by Counsel for Petitioner, Pet. Brief at 33-34] that only 'extremely rare[ly] has the death penalty been used when a defendant did not specifically intend the death of the victim. The representation made by petitioner Lockett, even if accept-

> ed uncritically, was merely that of 363 reported cases involving executions from 1954 to 1976, in 347 the defendant "personally committed a homicidal assault"—not that the defendant had actual intention to kill.

438 U.S. at 615 n.2.

Other statistics relied upon by Petitioner are also suspect. His accounting of the statistics available for the criminals on death row as of October 21, 1980 can be read to support the arguments of Respondent as well. Brief of Pet. at 35. For example, Petitioner states that "[o]f the 739 for whom sufficient data are available . . . only 41 did not personally participate in the fatal assault upon the victim." *Id.* In the first instance, the statistics seem to represent a rejection of capital punishment for those who do not actually pull the trigger. But yet they can also be read to represent society's willingness, when circumstances warrant, to impose capital punishment in a substantial number of cases on criminals who did not "pull the trigger," but who are nonetheless responsible for the deaths which result from their illegal acts.

WLF reads those statistics in the latter fashion and finds support for its conclusion in public opinion surveys. Public opinion polls not only demonstrate that a broad segment of our society supports capital punishment for murder, but for various other crimes as well. A 1966 poll found that 42 percent of those polled favored capital punishment while 11 percent had no opinion and 47 percent opposed it. A 1969 poll, however, indicated 51 percent in favor, 9 percent with no opinion, and 40 percent opposed. Erskine, *The Polls: Capital Punishment*, 34 Public Opinion Quarterly 290 (1970). By 1973, 59 percent favored the death penalty with 31 percent opposed, while by 1977, 67 percent were in favor and only 25 percent opposed. U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS at 199 (1980).

More importantly for present purposes, a 1981 survey conducted by *Time* magazine indicates that 73 percent of

the American public "approve the *wider use of the death penalty for such crimes as hijacking* or killing a police officer." *Time*, June 1, 1981 at 13, col. 3 (emphasis added). It is particularly telling that approval was voiced for employing capital punishment as a possible penalty for hijacking, a crime which does *not* usually result in any one's death or injury. *See also*, Field Newspaper Syndicate, "The Gallup Poll: Support for Death Penalty Greatest In 28 Years," (March 1, 1981).

WLF believes that the poll reflects society's recognition of the high degree of risk created by some crimes in which death does not always result and the concomitant need to have severe penalties available for them. Thus, objective evidence demonstrates that our mature society believes that capital punishment should at least be available as a sanction in felony murder cases.

3. *Legal authority relied upon by Petitioner buttresses* the conclusion that his sentence is constitutionally valid.

An objective examination of the legal authority relied upon by Petitioner supports the conclusion that Earl Enmund's sentence is constitutionally valid. In arguing that society rejects capital punishment for felony murder, Petitioner relies in part on the American Law Institute's Model Penal Code (MPC) and a number of State cases. However, Petitioner's sentence would be affirmed under the reasoning of the MPC or the State cases.

Petitioner's brief is peppered with references to the 1980 Official Draft and Revised Comments of the MPC, particularly the "murder" provision, § 210. His arguments would lead this Court to believe that the drafters of the Model Penal Code have rejected capital punishment for felony murder. Such a belief would be mistaken.

In laboring to *adapt* the traditional common law doctrine of felony-murder to the realities of contemporary American society, the drafters of the MPC attempted to advance a "new approach" to the problem of homicide

occurring in the course of a felony. They formulated the following language to prevent an accomplice to a crime of the kind usually included in first degree felony-murder from escaping a murder conviction:

> (1) Except as provided in Section 210.3 (1) (b), criminal homicide constitutes murder when:
>
> (a) it is committed purposely or knowingly; or
>
> (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life. Such recklessness and indifference are presumed if the actor is engaged or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.
>
> (2) Murder is a felony of the first degree [but a person convicted of murder may be sentenced to death, as provided in Section 210.6].

ALI, MODEL PENAL CODE, § 210.2.

In the drafters' own words:

> Subsection (1) (b) creates a presumption of the required recklessness [which will constitute murder] . . . if a homicide occurs during the commission or attempted commission of robbery, ... The presumption also arises . . . *if he is an accomplice to the commission of one of the specified crimes when the killing takes place.*

ALI, MODEL PENAL CODE, § 210.2, Comments, at 29-30 (1980) (emphasis added).

The effect of the MPC, therefore, is to abandon felony murder as a separate basis for establishing liability for homicide and to retain the presumption described above as a means of facilitating proof.

The drafters conclude that under the felony murder doctrine:

> . . . it remains indefensible in principle to use the sanctions that the law employs to deal with murder *unless* there is at least a finding that the actor's con-

> duct manifested an extreme indifference to the value of human life. [Nevertheless] [t]he fact that the actor was engaged in a crime of the kind that is included in the usual first-degree felony-murder enumeration, will frequently justify such a finding. *The result may not differ often under such a formulation from that which would be reached under some form of the felony-murder rule.*

ALI, MODEL PENAL CODE, § 210.2, Comments, at 38-39 (1980) (emphasis added).

Assuming, *arguendo*, that the MPC had been in place in lieu of the Florida statutory scheme under which Enmund was sentenced, there is no reason to believe that Petitioner would not have been guilty of first degree murder. On the contrary, given the jury's findings as well as those of the Florida Supreme Court that Petitioner's participation in the crime was "major," the conclusion is equally inescapable that the jury would also have found that Enmund perceived and consciously disregarded the risk of death of the Kerseys and was "reckless" within the meaning of 210.2(1)(b). A finding of murder in the first degree would therefore not be anomalous under the MPC.

Similarly, Petitioner could be sentenced to death under the MPC, § 210.2(2), as long as the requirements of § 210.6 of the MPC were satisfied. A comparison of § 210.6 with the procedures employed in the Florida court reveal that they are nearly identical; a separate proceeding was conducted and both mitigating and aggravating circumstances were examined.

The State court decisions cited by Petitioner also demonstrate that his sentence should be affirmed. For example, he relies upon three cases drawn from "jurisdictions . . . with well-established pre-*Furman* traditions of appellate review of capital sentences" for the proposition that even these courts recognized that "death sentences should be reduced in cases in which (i) there was not a strong showing of premeditation, or (ii) the offender was not the actual perpetrator of the homicide." Brief of Pet.

at 24 n.37, *citing*, *State v. Hall*, 176 Neb. 295, 125 N.W. 2d 918 (1964); *Wesley v. State*, 112 Neb. 360, 199 N.W. 719 (1924); *Fritz v. State*, 8 Okla. Cir. 342, 128 Pac. 170 (1917). *See also*, cases cited in Brief of Pet. at 36-37 n.55. Even a cursory reading of these cases reveals that they do not support the broad proposition advanced.

While space considerations prohibit a case-by-case accounting of all these decisions, it is instructive to examine a few. In *State v. Hall*, *supra*, the court reduced a capital sentence based upon:

> Consideration of all of the circumstances, that is, the age of the defendant, that he is a feebleminded person, a low-grade moron or a high-grade imbecile, passive in nature, possessed of a disposition to follow the lead of others, and who previously had no offense charged against him. . . .

125 N.W.2d at 927.

Similarly, the court in *Wesley v. State*, *supra*, found that the defendant was younger than his co-felons, had previously been a law-abiding citizen, and the robbery had been the suggestion of another.

The instant case is entirely different. The idea to rob the Kerseys was Earl Enmund's. He was the prime mover in the conspiracy that carried out that idea. At 44 years of age, Petitioner was older than his co-felons. He had a prior record of violent crime. A reasonable inference may be drawn from the record that he supplied at least one of the murder weapons and it was proven that he ordered the disposal of the weapons to avoid detection.

In short, the Florida courts, like the courts in the cases cited by Petitioner, considered a wide range of circumstances which are unique to Petitioner's case and character. Nonetheless, they concluded that in Petitioner's case a capital sentence was warranted. This Court can only overturn that judgment by substituting its personal view of the facts for the factual determination of the jury and lower courts.

Finally, it is worth noting that in *Fritz v. State*, *supra*, the court reduced the sentence to life at hard labor. The

court's statement in reaching that decision is even more noteworthy, however:

> [W]e do not wish to be understood as being in favor of abolishing capital punishment as a penalty for murder. We think that capital punishment, at the discretion of the jury, as the penalty of murder, is essential, to the security of society, and we have no sympathy with that sentimental humanitarianism which in the exercise of a mawkish sympathy for a heartless, unfeeling felonious assassin forgets and wholly ignores the innocent murdered victim and the necessary safeguards of society. If capital punishment should be abolished without some limitation of the pardoning power in convictions of murder and manslaughter, and the indiscriminate exercise of the pardoning power in this character of conviction should continue, it cannot be doubted that convictions of murder and manslaughter in this state would then in many cases be but a mere mockery of law and justice.

128 Pac. at 171.

Amen!

D. Deterrence And Retributive Justice Are Measurably Served By The Imposition Of Capital Punishment For Felony Murders.

Petitioner also argues that capital punishment does not serve the well-recognized social goals of deterrence and retribution. Brief of Pet. at 38-45. *Amicus* strongly rejects that argument and submits that deterrence and retributive justice are advanced by the imposition of capital punishment on felony murderers.

1. *Imposing capital punishment for felony murders will have a deterrent effect on the commission of both felonies and murder.*

Amicus submits that the imposition of the death penalty will actually have a deterrent effect on the commission of future felonies and hence, felony murders, and thus result in a *saving* of innocent lives. Because of the breakdown of our current criminal justice system, a reasonable

perception exists that the costs of engaging in criminal conduct is low when compared to the benefits derived from the criminal activity. When the benefits outweigh the costs, or even appear to, one can fairly predict a rise in criminal conduct. In short, crime *does* pay. See North & Miller, THE ECONOMICS OF PUBLIC ISSUES 163 (1980).

However, calculating criminals like Enmund would think twice about aiding or abetting the commission of a felony if this Court were to uphold the death penalty for cases such as this. They would know that if one of their group were to kill the victim in the commission of the crime, *all* could suffer the dire consequences of their collective action, even if a specific intent to kill were not actually formulated. Consequently, there would be a marked decrease in the commission of all underlying felonies since a felony murder situation usually contemplates the participation of two or more persons for the successful completion of the underlying felony (*e.g.*, a person to serve as a lookout, get-away driver, etc.). Without the necessary participants in the felony, the original organizer is likely to abandon his plans.[2] Thus, not only will the commission of all such felonies decrease, but also

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[2] Felony murder is also possible where a felon, acting alone, accidentally kills someone during the course of the felony. Even if he did not specifically intend to kill, capital punishment would no doubt deter criminals from carrying lethal weapons during the commission of a felony or from committing the felony at all.

If two or more persons are contemplated for the commission of a felony, the organizer of a felony may try to convince his co-conspirators to help him carry out his felonious plans by not using lethal weapons, thereby offering his accomplice or accomplices some assurance that a felony murder will not occur. In such a case, society benefits because less victims will be killed. If the organizer fails to convince his potential abettors to help him commit the felony, and if he decides instead to "go it alone" or with a reduced number of accomplices, the likelihood of detection and apprehension by law inforcement authorities increases because of the missing "lookout" accomplice or other person vital to the felonious plan. Again, society benefits from the deterrent effect of the threat of capital punishment.

there will be a net saving of innocent lives in those percentage of felonies where someone is killed.[3] For an excellent analysis of the deterrent effect of capital punishment on murder and felony murder, see Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AMERICAN ECONOMIC REVIEW 397, 400 (1975).

Amicus also takes exception to Petitioner's argument that only a small percentage (approximately .5 percent) of all felonies actually result in murder. Pet. Brief at 40-41, n.60. Petitioner's statistics are woefully outdated and undervalued by *3-5,000 percent.* The percentage of murders committed during the course of a felony for 1980 was 17.7 percent of the 21,860 total murders committed; 16.9 percent of 20,591 murders in 1979; 16.7 percent of 18,714 in 1978; 16.7 percent of 18,033 in 1977; and 17.7 percent of 16,605 in 1976. U.S. DEPT. OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES-1980 at 13 (1981). If you add to that percentage the additional 6 or 7 percent of murders committed in the course of a suspected felony, the result is that approximately *25 percent of all murders are felony murders. Id.*

Even if one were to use the conservative 17 percent figure, we are still talking about over 3,000 felony murders annually. How many of those 3,000 lives would be saved if capital punishment for felony murders was not only authorized, but carried out, is hard to say. But the Washington Legal Foundation believes that the deterrent effect argument is a valid one and, indeed, a humanitarian one because its purpose is to save lives. If capital punishment has no deterrent effect, it would be interesting to see what the felony murder rate would be if the punishment were reduced to a fine or brief incarceration.

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[3] It must be remembered that these felony murder type situations are not sponteneous "crimes of passion" where one might question the deterrent value of the death penalty.

2. *Retributive justice is served by punishing petitioner's felony murder with death.*

Petitioner Enmund's participation in the brutal killing and robbery of Mr. and Mrs. Kersey was major. Enmund planned the crime, was aware that dangerous weapons would be used in its commission, drove the get-away vehicle immediately following the murders, and directed the attempt to avoid detection by disposing of the murder weapons. To argue, therefore, that the death sentence imposed upon him by the Florida jury lacks any "retributive justification" wilfully misconceives both the nature of retribution and Petitioner's own high degree of moral culpability in the murders.

Petitioner is correct when he cites several authorities for the proposition that: "[t]he retributive theory presupposes moral guilt", and "rests on the idea that . . . because man is responsible for his acts, he ought to receive his just deserts." Brief of Pet. at 42. Rather than develop these vague generalities, however, Petitioner is content to leave the Court with an incomplete understanding of what the purpose of retributive justice is in a case such as the one at bar. Instead, he immediately shifts his focus to a discussion of mens rea and tells us his precise subjective state of mind at the time of the slayings. Retribution, however, entails much more in addition to one's moral culpability or lack thereof.

The retributive theory of justice is unquestionably the view most prevalently adhered to by the general public and its representatives. "To say that support for this view of punishment is widespread among leaders in the judiciary and in government is almost an understatement." B. Cavanaugh, "The Justification for Punishment," 16 *Alberta Law Review* 43 (1978).

Retribution is properly described as punishment in its purest form: "[t]he principal end of punishment in a retributionary scheme is to annul wrong and thereby vindicate right . . . . The injury to be annulled by punishment is not the determinate injury done to the victim but

the noumenal injury done to the moral order. Hence the measure of punishment is properly derived not from the qualitative or quantitative aspects of the crime (as in revenge) but from its moral significance" with "the severity of punishment . . . depend[ing] upon the perceived magnitude of the threat that the crime poses to the reality of human dignity." A. Brudner, "Retributivism and the Death Penalty," 30 UNIV. TORONTO L.J. 337, 350, 354 (1980). In the present instance, the wrong sought to be annulled through the imposition of the death sentence is obvious. Enmund is being punished for having planned and participated in the robbery of two elderly people whom he had reason to believe might resist and as to whose anticipated resistance he made allowance by having his co-conspirators come armed with deadly weapons.

Let us be clear on this point: Enmund planned the violent robbery of the Kerseys and thereby created the situation which led to their deaths. To argue, therefore, that Petitioner had no intent to kill because he was the driver of the get-away car flies in the face of the uncontroverted facts and is an insult to this Court. Determining the state of mind of any individual is always difficult. To do so, one cannot rely merely upon a defendant's after-the-fact statements. The jury, of course, considers those statements as they did in the instant case. More importantly, however, the jury views the facts and what one may be presumed to intend given the probable consequence of one's voluntary acts. In this case, the intent to kill was found not merely through a "strict liability" application of the Florida felony murder statute as Petitioner would have this Court believe, but from the fact that the killing was a natural and probable consequence of the conspiratorial acts which Enmund initiated and orchestrated.

Retribution is indeed that which is deserved. It led the Florida jury to the inexorable conclusion that the fundamental respect for human dignity, the dignity of the Kerseys as well as Petitioner, must lead to the death of the man who pulled the strings of the criminals who killed them.

II. RECOGNITION OF THIS COURT'S PROPER ROLE AND A RESPECT FOR THE VALUE OF HUMAN LIFE DICTATE THAT PETITIONER'S SENTENCE BE AFFIRMED.

Throughout its brief, *amicus curiae* Washington Legal Foundation has addressed the subject of this Court's proper role in death penalty cases and the dignity of human life. Nonetheless, the history of death penalty jurisprudence, including very recent history, suggests that further discussion is in order.

The Court's acknowledgements that capital punishment is constitutional and that its imposition is a factual matter properly left to legislatures and juries are too numerous to require repetitive citation here. Mere repetition of a principle cannot endow it with substance when its practical application is not forthcoming. While this Court continues to voice a recognition of its proper role in capital cases in print, it continues to carve out exceptions to imposing death sentences in practice.

Amicus suggests that in doing so, this Court is too often merely substituting its judgment for that of a legislature, a jury, or both. For example, the statement of the majority in *Eddings v. Oklahoma*, *supra*, slip op. at 12, that "*We do not weigh the evidence for* [the state courts]" is belied by the lengthy proceeding evaluation of the evidence which leaves little doubt as to the manner in which the Court expects the case to be decided on remand. This Court should not follow a similar course in the case at bar.

Even aside from the obvious impact that such judicial action has on public confidence in this Court and the criminal justice system, another more important effect must be considered. The acceptance of heinous violent crime by social authority anesthetizes all of society to its brutality. As social authority becomes less willing to pass any irrevocable judgment in cases in which the lives of law-abiding citizens are taken, respect for the value of human life itself is diminished. In essence, life becomes

less valuable as authority becomes less willing to severely sanction criminal conduct.

This Court bears an obvious and heavy responsibility in capital cases. Yet it is society that suffers the consequences of the failure to meet that responsibility. The Washington Legal Foundation submits that the respect for human dignity so often referred to by this Court should be extended to the victims of crime and the law-abiding public.

CONCLUSION

For all of the reasons stated above, the Washington Legal Foundation submits that Petitioner's sentence is constitutional and must be affirmed.

Respectfully submitted,

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